TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 694.

UNITED AMERICAN LINES, INCORPORATED; ATLANTIC MAIL CORPORATION, AMERICAN SHIP & COMMERCE NAVIGATION CORPORATION, *ET AL.*, APPELLANTS,

vs.

HENRY C. STUART, ACTING COLLECTOR OF CUSTOMS FOR THE PORT OF NEW YORK; JOHN D. APPLEBY, FEDERAL PROHIBITION ZONE CHIEF FOR THE STATES OF NEW YORK AND NEW JERSEY, AND WILLIAM HAYWARD, UNITED STATES ATTORNEY FOR THE SOUTHERN DISRICT OF NEW YORK.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED NOVEMBER 10, 1922.

(29,244)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 17, 1922.

1 By the Honorable Learned Hand, One of the United States District Judges for the Southern District of New York, in the Second Circuit, to Henry C. Stuart, Acting Collector of Customs for the Port of New York; John D. Appleby, Federal Prohibition Zone Chief for the States of New York and New Jersey, and William Hayward, United States Attorney for the Southern District of New York, Greeting:

You are hereby cited and admonished to be and appear in The Supreme Court of the United States to be holden at the City of Washington, District of Columbia, within thirty days from the date hereof, pursuant to an appeal allowed and filed in the office of the Clerk of the District Court of the United States for the Southern District of New York, wherein United American Lines, Incorporated, Atlantic Mail Corporation, American Ship and Commerce Navigation Corporation, and Shawmut Steamship Company, are appellants, and you are appellees, to show cause, if any there be, why the final order and decree in the said appeal mentioned, should not be corrected, and why speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan in the
2&3 City of New York, in the District and Circuit above named, this 9th day of November, in the year of our Lord, one thousand nine hundred and twenty two and of the Independence of the United States the one hundred and forty-seventh.

LEARNED HAND,
United States District Court Judge for the Southern District of New York in the Second Circuit.

4 [Endorsed:] The District Court of the United States for the Southern District of New York. United American Lines, Incorporated, Atlantic Mail Corporation, American Ship and Commerce Navigation Corporation, and Shawmut Steamship Company, Complainants, against Henry C. Stuart, Acting Collector of Customs for the Port of New York; John D. Appleby, Federal Prohibition Zone Chief for the States of New York and New Jersey, and William Hayward, United States Attorney for the Southern District of New York, Defendants. Citation. Filed November 9, 1922. Alex Gilchrist, Jr., Clerk. Service of a copy of the within Citation is admitted this 9th day of November, 1922. William Hayward, United States Attorney for the Southern District of New York. Clark, Carr & Ellis, 120 Broadway, New York.

5 The District Court of the United States for the Southern D
trict of New York.

In Equity.

Eq. 25-13.

UNITED AMERICAN LINES, INCORPORATED; ATLANTIC MAIL COR
ration; American Ship and Commerce Navigation Corporati
and Shawmut Steamship Company, Complainants,

against

HENRY C. STUART, Acting Collector of Customs for the Port of N
York; John D. Appleby, Federal Prohibition Zone Chief for
States of New York and New Jersey, and William Haywa
United States Attorney for the Southern District of New Yo
Defendants.

Assignment of Errors.

Come now the complainants above named, by their solicitors,
respectfully aver and allege that the Honorable the District Cour
the United States for the Southern District of New York, erred
the cause foregoing, in the respects following, to-wit:

First. That the Court erred in dismissing the amended bill of c
plaint herein.

Second. That the Court erred in denying the petition for an
junction.

Third. That the Court erred in holding that the Eightee
Amendment of the Constitution of the United States prohi
6 a ship of American registry from keeping on board such s
while on the territorial waters of the United States, int
cating beverage liquors constituting part of the regular sea store
such ship lawfully acquired by it in a foreign jurisdiction and
board solely for the sale and consumption thereof on board s
ship upon the high seas and in foreign ports and outside the t
torial waters of the United States.

Fourth. That the Court erred in holding that the National
hibition Act prohibits a ship of American registry from keeping
board such ship, while on the territorial waters of the United St
intoxicating beverage liquors constituting part of the regular
stores of such ship lawfully acquired by it in a foreign jurisdic
and on board solely for the sale and consumption thereof on b
such ship upon the high seas and in foreign ports and outside
territorial waters of the United States.

Fifth. That the Court erred in holding that the keeping on b
a ship of American registry, while on the territorial waters of

United States, of intoxicating beverage liquors, constituting part of the regular sea stores of such ship lawfully acquired by it in a foreign jurisdiction and on board solely for the sale and consumption thereof on board such ship upon the high seas and in foreign ports and outside the territorial waters of the United States, constitutes transportation of such intoxicating beverage liquors within the prohibition of the Eighteenth Amendment of the Constitution of the United States.

Sixth. That the Court erred in holding that the keeping on board a ship of American registry, while on the territorial waters of the United States, of intoxicating beverage liquors, constituting part of the regular sea stores of such ship lawfully acquired by it in a foreign jurisdiction and on board solely for the sale and consumption thereof on board such ship upon the high seas and in foreign ports and outside the territorial waters of the United States, constitutes transportation of such intoxicating beverage liquors within the prohibition of the National Prohibition Act.

Seventh. That the Court erred in holding that the possession within the territorial waters of the United States of intoxicating beverage liquors in the circumstances mentioned in the Third Assignment of Error is prohibited by the Eighteenth Amendment of the Constitution of the United States.

Eighth. That the Court erred in holding that the possession within the territorial waters of the United States of intoxicating beverage liquors in the circumstances mentioned in the Fourth Assignment of Error is prohibited by the National Prohibition Act.

Ninth. That the Court erred in holding that the Eighteenth Amendment of the Constitution of the United States prohibits a ship of American registry from keeping on board such ship, while upon the high seas and in foreign ports and outside the territorial waters of the United States, intoxicating beverage liquors constituting part of the regular sea stores of such ship lawfully acquired by it in a foreign jurisdiction and on board solely for the sale and consumption thereof on board such ship upon the high seas and in foreign ports and outside the territorial waters of the United States.

Tenth. That the Court erred in holding that the National Prohibition Act prohibits a ship of American registry from keeping on board such ship, while upon the high seas and in foreign ports and outside the territorial waters of the United States, intoxicating beverage liquors constituting part of the regular sea stores of such ship lawfully acquired by it in a foreign jurisdiction and on board solely for the sale and consumption thereof on board such ship upon the high seas and in foreign ports and outside the territorial waters of the United States.

Eleventh. That the Court erred in holding that the keeping on board a ship of American registry, while upon the high seas and in foreign ports and outside the territorial waters of the United States, of

intoxicating beverage liquors, constituting part of the regular sea stores of such ship lawfully acquired by it in a foreign jurisdiction and on board solely for the sale and consumption thereof on board such ship upon the high seas and in foreign ports and outside the territorial waters of the United States, constitutes transportation of such intoxicating beverage liquors within the prohibition of the Eighteenth Amendment of the Constitution of the United States.

Twelfth. That the Court erred in holding that the keeping on board a ship of American registry, while upon the high seas and in foreign ports and outside the territorial waters of the United States, of intoxicating beverage liquors, constituting part of the regular sea stores of such ship lawfully acquired by it in a foreign jurisdiction and on board solely for the sale and consumption thereof on board such ship upon the high seas and in foreign ports and outside the territorial waters of the United States, constitutes transportation of such intoxicating beverage liquors within the prohibition of the National Prohibition Act.

Thirteenth. That the Court erred in holding that the possession upon the high seas and in foreign ports and outside the territorial waters of the United States of intoxicating beverage liquors in the circumstances mentioned in the Eleventh Assignment of Error is prohibited by the Eighteenth Amendment of the Constitution of the United States.

Fourteenth. That the Court erred in holding that the possession upon the high seas and in foreign ports and outside the territorial waters of the United States of intoxicating beverage liquors in the circumstances mentioned in the Twelfth Assignment of Error is prohibited by the National Prohibition Act.

10 Fifteenth. That the Court erred in holding that the Eighteenth Amendment of the Constitution of the United States prohibits the sale of intoxicating beverage liquors, constituting part of the regular sea stores of such ship lawfully acquired in a foreign jurisdiction, on board a ship of American registry upon the high seas and outside the territorial waters of the United States.

Sixteenth. That the Court erred in holding that the National Prohibition Act prohibits the sale of intoxicating beverage liquors, constituting part of the regular sea stores of such ship lawfully acquired in a foreign jurisdiction, on board a ship of American registry upon the high seas and outside the territorial waters of the United States.

Seventeenth. That the Court erred in holding that the Eighteenth Amendment of the Constitution of the United States prohibits the sale of intoxicating beverage liquors, constituting part of the regular sea stores of such ship lawfully acquired in a foreign jurisdiction, on board a ship of American registry in foreign ports and in the territorial waters of foreign nations.

Eighteenth. That the Court erred in holding that the National Prohibition Act prohibits the sale of intoxicating beverage liquors, constituting part of the regular sea stores of such ship lawfully acquired in a foreign jurisdiction, on board a ship of American registry in foreign ports and in the territorial waters of for-
11 & 12 eign nations.

Nineteenth. The National Prohibition Act as construed and applied by the District Court of the United States for the Southern District of New York is unconstitutional and void because enforcement thereof would deprive the complainants of their property and subject the complainants to penalties without due process of law.

Wherefore, complainants pray that the said final order and decree of the District Court of the United States for the Southern District of New York be in all things reversed, for naught held and set aside, and that an injunction be granted the complainants as prayed for in their amended bill of complaint herein, and for such other and further relief as to the Court may seem just and proper.

CLARK, CARR & ELLIS,
Solicitors for Complainants.

13 [Endorsed:] The District Court of the United States for the Southern District of New York. United American Lines, Incorporated, Atlantic Mail Corporation, American Ship and Commerce Navigation Corporation, and Shawmut Steamship Company, Complainants, against Henry C. Stuart, Acting Collector of Customs for the Port of New York, et al., Defendants. Assignment of Errors. Filed November 9th, 1922. Alex Gilchrist, Jr., Clerk. Clark, Carr & Ellis, 120 Broadway, New York, Solicitors for Complainants.

14 & 15 The District Court of the United States for the Southern District of New York.

In Equity.

Eq. 25-13.

UNITED AMERICAN LINES, INCORPORATED, ATLANTIC MAIL CORPORATION, American Ship and Commerce Navigation Corporation, and Shawmut Steamship Company, Complainants,

against

HENRY C. STUART, Acting Collector of Customs for the Port of New York; John D. Appleby, Federal Prohibition Zone Chief for the States of New York and New Jersey, and William Hayward, United States Attorney for the Southern District of New York, Defendants.

Order Allowing Appeal.

On motion of Reid L. Carr, Esq., of solicitors for complainants in the above entitled cause, it is hereby

Ordered that an appeal to The Supreme Court of the United States from the final order and decree heretofore filed and entered herein be, and the same is hereby allowed, and that a transcript of the record, proceedings and papers upon which said final order and decree was made be forthwith transmitted to said The Supreme Court of the United States.

It is further ordered that the bond on appeal be fixed at the sum of Two Hundred and Fifty Dollars ($250.00), the same to act as a bond for costs.

Dated, New York City, November 9, 1922.

LEARNED HAND,
District Judge.

16 [Endorsed:] The District Court of the United States for the Southern District of New York. United American Lines, Incorporated, Atlantic Mail Corporation, American Ship and Commerce Navigation Corporation, and Shawmut Steamship Company, Complainants, against Henry C. Stuart, Acting Collector of Customs for the Port of New York, et al., Defendants. Order Allowing Appeal. Filed November 9th, 1922. Alex Gilchrist, Jr., Clerk. Clark, Carr & Ellis, 120 Broaday, New York, Solicitors for Complainants.

17 The District Court of the United States for the Southern District of New York.

In Equity.

Eq. 25-13.

UNITED AMERICAN LINES, INCORPORATED, ATLANTIC MAIL CORPORATION, American Ship and Commerce Navigation Corporation, and Shawmut Steamship Company, Complainants,

against

HENRY C. STUART, Acting Collector of Customs for the Port of New York; John D. Appleby, Federal Prohibition Zone Chief for the States of New York and New Jersey, and William Hayward, United States Attorney for the Southern District of New York, Defendants.

Petition for Appeal.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The above named, United American Lines, Incorporated, Atlantic Mail Corporation, American Ship and Commerce Navigation Corporation, and Shawmut Steamship Company, corporations, complainants in the cause above entitled, conceiving themselves aggrieved by the final order and decree rendered and entered in the above entitled

cause, on the 30th day of October, 1922, do hereby severally appeal from said final order and decree, to the Supreme Court of the United States, for the reasons specified in the assignment of errors filed herewith, and they respectfully pray that this appeal be allowed
18 & 19 and that citation be issued as provided by law, and that a transcript of the record, proceedings, and papers upon which said final order and decree was made, duly authenticated, be sent to said The Supreme Court of the United States, sitting at the City of Washington, District of Columbia, under the rules of such Court in such cases made and provided.

And your petitioners further pray that the proper order relating to the security to be required of them, be now made.

CLARK, CARR & ELLIS,
Solicitors for Complainants.

20 [Endorsed:] The District Court of the United States for the Southern District of New York. United American Lines, Incorporated, Atlantic Mail Corporation, American Ship and Commerce Navigation Corporation, and Shawmut Steamship Company, Complainants, against Henry C. Stuart, Acting Collector of Customs for the Port of New York, et al., Defendants. Petition for Appeal. Filed November 9th, 1922. Alex Gilchrist, Jr., Clerk. Clark, Carr & Ellis, 120 Broadway, New York, Solicitors for Complainants.

21 & 22 At a Stated Term of the District Court of the United States for the Southern District of New York Held in the Court Room thereof, at the Post Office Building, Borough of Manhattan, City of New York, on the 30th Day of October, 1922.

Present: Honorable Learned Hand, District Judge.

In Equity.

Eq. 25-13.

UNITED AMERICAN LINES, INCORPORATED, ATLANTIC MAIL CORPORATION, American Ship and Commerce Navigation Corporation, and Shawmut Steamship Company, Complainants,

against

HENRY C. STUART, Acting Collector of Customs for the Port of New York; John D. Appleby, Federal Prohibition Zone Chief for the States of New York and New Jersey, and William Hayward, United States Attorney for the Southern District of New York, Defendants.

Final Order and Decree.

This cause came on to be heard at this term upon motions by the defendants to dismiss the amended bill of complaint, and by the complainants for a final decree in their favor on the pleadings, and was

argued by counsel; and thereupon, upon consideration thereof, it was

Ordered, adjudged, and decreed that the amended bill of complaint herein be dismissed and defendants have judgment against the complainants for their costs to be taxed.

(Sgd.) LEARNED HAND,
District Judge.

23 [Endorsed:] The District Court of the United States for the Southern District of New York. United American Lines, Incorporated, Atlantic Mail Corporation, American Ship and Commerce Navigation Corporation, and Shawmut Steamship Company, Complainants, against Henry C. Stuart, Acting Collector of Customs for the Port of New York, et al., Defendants. Final Order and Decree. Filed October 31, 1922. Alex Gilchrist, Jr., Clerk. Clark, Carr & Ellis, 120 Broadway, New York, Solicitors for Complainants.

24 United States District Court, Southern District of New York.

INTERNATIONAL MERCANTILE MARINE

against

HENRY C. STUART, Acting Collector of Customs for the Port of New York, et al.

UNITED AMERICAN LINES

against

HENRY C. STUART, Acting Collector of Customs for the Port of New York, et al.

Appearances:

Cletus Keating, Esq., and John M. Woolsey, Esq., for International Mercantile Marine.

Reid L. Carr, Esq., for United American Lines.

William Hayward, Esq., United States Attorney, and John Holley Clark, Esq., Assistant United States Attorney, for Defendants.

LEARNED HAND, *D. J.*:

The plaintiffs (the American Lines) have now amended their bills so as to allege that the District Attorney for the Southern District of New York has threatened to prosecute them for sales made on shipboard at sea upon ships of American registry. Therefore the question is raised which I declined to consider in my original opinion and its decision has become necessary.

The question so raised is altogether different from that dis-
25 cussed before. No difficulty arises from the character of the act itself. The plaintiffs sell liquors on the high seas, or dispense them to passengers. The only question is of the place where this occurs, i. e., on board a ship of American registry outside the boundaries of the United States. Is that a place covered by the

Eighteenth Amendment? I may in the first place lay aside any question of Congressional intent. Section three alone would have been enough, as I have already interpreted it, to cover all places where the Amendment could operate. However, I am not left in this matter to Section three alone; Section three of the Supplemental Act passed November 3, 1921, leaves no doubt of the intent of Congress. By this it was enacted that the original Act should "apply not only to the United States but to all territory subject to its jurisdiction," almost exactly the words* used in the Amendment itself. Whatever doubt there might be,—and it seems to me that there was none—of the meaning of the original Act, it is certainly laid by this Section of the latter.

It is, however, argued that there is no provision in the Prohibition Enforcement Act under which sales at sea could be prosecuted. The penalties for sales of liquors are provided in Section twenty-
26 nine of the Act, and are general in their character. They do not specify where the prosecution shall take place or any of its procedure. This is quite natural, since all such matters are provided for in the statutes of the United States. By Revised Statutes, Section 730, it is enacted that "the trial of all offenses committed on the high seas * * * shall be in the district where the offender is found or into which he is first brought." On its face this would cover a sale of liquor upon a ship at sea, if that were in fact a crime. I can see no reason to limit its scope to crimes such as are created by Chapter thirteen of the Criminal Code and are there described as crimes on the high seas. If congress, having power to make an act done at sea criminal, does so, it is none the less a crime committed at sea, because it is not described as such. And so there seems to me nothing in this point, once it appears that the purpose was to make all sections of the act apply as generally as the Amendment allowed.

Therefore, the question becomes a straight interpretation of the Amendment itself. Does it cover American ships on the high seas? The plaintiffs argue that nothing is specified as to ships, that it is only by a fiction (and that too one which does not universally apply) that an American ship may be called a part of the territory of
27 the United States, that in dealing with Section three of Article four of the Constitution, the word, "territory" has been defined as "lands" and that the limitations upon the power of Congress have been held not to apply to territories until they have been extended by Congress, Downes v. Bidwell, 182 U. S. 244, 278, Dorr v. U. S. 185 U. S. 138, Hawaii v. Mankichi, 190 U. S. 197.

It is quite true that the Amendment does not mention ships; nor does it mention waters, or islands. But a constitution is not a deed; its intent is not exhausted by its details, but incorporated in its objects. The question is not what it specified, but what it wills. It is also true that it is a fiction to call a ship a part of the territory of the flag State, although for some purposes it is so treated.† But as Lord

*The Amendment reads, "the jurisdiction thereof."

†Oppenheim (International Law Vol. I "Peace" Sec. 172), says "merchantment on the high seas are for some points treated as though they were floating parts of the territory of the State under whose flag they legitimately sail."

Blackburn said in Reg. v. Anderson, L. R. 1 Crown Cas. Res. 161, 169, it has been called such in countless cases, and that is important when one is interpreting legal words, because though fictions may be only the disguises of the law before logic, they are parts of its wardrobe for all that. While it may be,—and I expect it is—only a coincidence that a ship conventionally falls within the words so used in the Amendment, it is therefore no answer to argue that it does so through a legal fiction.

Second, the plaintiffs overpress a chance phrase in U. S. v. Gratiot, 14 Pet. 526,537. In speaking of Section three of Article four Thompson, J. said that "territory" was "equivalent to lands," hence the plaintiffs believe that "territory" in other parts of the Constitution can only mean lands. Indeed, "lands" might properly enough include waters, and if it did not, the reasoning would deprive the United States of jurisdiction over the bays and waters of Alaska, for example. However, I do not wish to rest on any such verbal dialectic. It is of course fair to construe the Constitution as a whole and by cross-reference; yet the same word need not always mean the same thing. The Eighteenth Amendment certainly includes under "territory subject to the jurisdiction" of the United States all the "territory" covered by Section three of Article four, but it may include more as well. It was, I think, equivalent to the phrase, "territorial jurisdiction," and it is not unlikely that the currency of that phrase influenced the substitution of "territory" for "place" in the Thirteenth Amendment, a change in which I cannot see any significance.

Either phrase means to include all subjects of the State's power and the verbal difficulties touching ships arise, I suspect, from a confusion which goes deeper than at once appears. According to modern notions the jurisdiction, i. e. the power to do as it wills, of a State, is limited by geographical boundaries. But it has been so only recently; until at least the Sixteenth Century sovereignty was personal, and allegiance was the basis of what we should now call jurisdiction. The seas admit of no boundaries; they are free to all and upon them territorial jurisdiction is anomalous. Yet a ship has by a curious persistence retained from very ancient times a fictitious personality, more perhaps in our law than elsewhere. The China, 7 Wall. 53, The Barnstable, 181 U. S. 464, 467, 468, The Eugene F. Moran, 212 U. S. 466, 474.

To attribute, therefore, a fictitious personal allegiance to a ship was natural, and such in effect she has, even to the extent of subjecting to jurisdiction the nationals of another State, in re. Ross: 140 U. S. 453. It was equally natural, nevertheless, for the law to insist upon

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Again, in more specific language, (Sec. 264), "Private vessels are only considered as though they were floating portions of the flag State in so far as they remain whilst on the open sea in principle under the exclusive jurisdiction of the flag State. Thus the birth of a child, a will or business contract made or a crime committed on board ship, and the like, are considered as happening on the territory, and therefore under the territorial supremacy of the flag State. But although they appear in this respect as though they were, private vessels are in fact not floating portions of the flag State."

its more modern territorial*y* category, so as to hold its old wine in new bottles, and to keep that face of consistency which is so important to its prestige. This I believe may be the reason for the fiction which the plaintiffs decry, and this makes it proper to include within such phrases as these a subject of power which cannot with any propriety be classified territorially.

Nor does the plaintiff's final argument fare better. Cases Like Downes vs. Bidwell, supra, Dorr v. U. S. supra, Hawaii v. Mankichi, supra, have no application. They dealt with limitations on a delegated power of Congress, which it must extend to the territories before it will apply. In re. Ross, supra, was like them; it dealt with the right of trial by jury in a consular court. But the Eighteenth Amendment is not a limitation upon the powers of Congress; it is not even a new power conferred. It is a "police" regulation, emanating directly from the sovereign legislating in person and not by deputy. As such it is self-executory, qua prohibition, (National Prohibition Cases, 253 U. S. 350, 386 "Sixth Conclusion") and needs no extension by Congress. For its effective enforcement statutes must indeed be passed, but it extends to what it covers ex proprio vigore.

However, the form of the Amendment answers the argument. In 1920 the United States had all been organized into States and "territory" which meant something could only mean possessions acquired by conquest or purchase. To these the Amendment extended by its own terms, and the question can only be what those terms mean. If they include ships of American registry, these are within it by the very language; if they do not, Congress cannot extend it to them. Ships are not in a third class. But perhaps the easiest answer is that if Congress must act, it has acted, as I have already said. Nor is the exemption of the Canal Zone material. Congress has indeed shown that it supposed it could exclude certain transportation from the Amendment and perhaps Congress is right. Even so, no inference can be made that it thought the Amendment did not apply before it had acted, and if it could, with all deference the supposition would be an error.

Scharrenberg v. Dollar S. S. Co. 245 U. S. 122, seems indeed a case for the plaintiffs, and so it is, if some of the language be read without care. But in that case while the statute considered was as broad as the Amendment, the facts were quite different. The question was whether the ship had assisted in the migration or importation into the United States of a contract laborer, that is of a person who was to "perform labor in this country." The court held first that a seaman was not a laborer, and second, that on a ship he was not employed to "perform labor in this country." Now clearly "this country" is a different phrase from "territory subject to the jurisdiction of the United States." Granting that when he was assisted to sign on, he was "imported into" the United States, a very doubtful concession at best, he was certainly not laboring in the country when he helped work the ship. The language of Mr. Justice Clarke on page 127, on which so much stress is put, is carefully guarded; it says only that a ship is not territory in the sense that statute, especially agreeing that for purposes of jurisdiction

it often is. No argument can be drawn from so limited a statute to a comprehensive amendment such as that at bar.

So much then for verbal discussion. The natural meaning of the words includes all subjects over which the United States has jurisdiction. As for implications, I need add nothing to what I have already said in my first opinion. It would be a curious thing if a country professing under its fundamental law to forbid the use of intoxicants were to allow them without stint upon ships that sailed under its flag. The only distinction pressed is the disastrous consequences to an American merchant marine if of all ships at sea ours alone are within this ban. In the first place, the discrimination applies only to passenger vessels, which are a small part of any merchant marine. The whole argument is, however, misconceived. The Eighteenth Amendment involved the destruction at a blow of property values far greater than that of the whole passenger fleet. The motives which directed it disregarded
33 ordinary commercial interests; it was a reform based upon the belief that the use of alcohol was one of the great evils of modern life, against whose utter extirpation no present rights of property might stand. (National Prohibition Cases, supra, Tenth Conclusion.) And while a merchant marine may be thought to have a national importance quite independent of the property involved in it, a court may not imply exceptions in the language of a constitution based upon its estimate of the relative advantages of what it will realize and what it will destroy.

I conclude therefore that a ship of American registry at sea or within a foreign port is within the scope of the Amendment and of Section three, and that the bills must be dismissed. The International Mercantile Marine sails from the port of Antwerp. By Belgian law a certain ration of wine is prescribed for all passengers, without which clearance will be denied. Pending the appeal and in addition to the stays given in the other cases, the District Attorney will be stayed from undertaking any prosecution against that plaintiff because of compliance with the Belgian law in that regard. This does not apply to east bound voyages. I see no reason why the bond should be larger on this account, but I will hear the District Attorney on that point if he wishes.

Bill dismissed with costs, injunctions as stated pend-
34 & 35 ing appeals. Settle orders on notice.

October 26, 1922.

____ ____,
D. J.

36 [Endorsed:] The District Court of the United States for the Southern District of New York. United American Lines, Incorporated, Atlantic Mail Corporation, American Ship and Commerce Navigation Corporation, and Shawmut Steamship Company, Complainants, against Henry C. Stuart, Acting Collector of Customs for the Port of New York; John D. Appleby, Federal Prohibition Zone Chief for the States of New York and New Jersey, and William

Hayward, United States Attorney for the Southern District of New York, Defendants. Opinion. Filed October 26, 1922. Alex Gilchrist, Jr., Clerk. Clark, Carr & Ellis, 120 Broadway, New York.

37 United States District Court, Southern District of New York.

THE CUNARD STEAMSHIP COMPANY, LTD., and ANCHOR LINE (HENDERSON BROTHERS), LTD.,

against

ANDREW W. MELLON, Secretary of the Treasury of the United States, et al.

And Ten Other Cases.

These cases come up upon motions by the defendants to dismiss the bills, and by the plaintiffs for final decrees upon the answers. The pleadings have been so drawn on both sides as to raise the merits of the controversy, and it is not necessary to set them forth in detail.

The facts are these: Since the enactment of the War Prohibition Act in October, 1919, which was followed in January, 1920, by the Eighteenth Amendment and the National Prohibition Act, it has been the continuous custom of all transatlantic passenger steamers to bring into the Port of New York limited stocks of wines and liquors as part of their sea-stores. This was done with the consent of the public authorities who promulgated regulations recognizing the practise, but providing that, while within the territorial waters of the United States, they should remain intact under seal. The theory on which the authorities proceeded, acting on an opinion at that time given by the Attorney General, was that, as part
38 of the ship's stores, these wines and liquors, if sealed and kept on board, were not to be regarded as brought within the country at all, or as subject to its municipal law, in accordance with the general rule that as respects what happens upon the deck of a foreign ship, the municipal law does not apply, except in cases where the peace of the sovereign is at stake. Later the permission so given was further extended to allow the ships to dispense to their crews their customary ration of wine, as was in some cases required by the laws of the country from which they came.

This being the posture of affairs, on May 15, 1922, the Supreme Court decided in the cases of Grogan v. Walker, and Anchor Line v. Aldridge, that the bare transit of liquors across the territory of the United States was transportation within the Eighteenth Amendment. Thereafter the present Attorney-General, after consideration, on October fifth, 1922, rendered an opinion to the Secretary of the Treasury that these decisions covered passenger steamers plying in and out of the ports of this country. The President thereupon publicly announced that after a given date he should proceed to execute the law in accordance with this opinion, and this created the situation out of which these bills arise.

The practice of all steamers has been freely to sell wines and liquors out of these stocks to their passengers on east-bound voyages when once outside the league limit, and to replenish them in Europe so that they should suffice for a round trip. The stocks in question are therefore carried into the Port, kept there under seal, and carried out again, only for the entertainment of passengers embarking from the United States. Besides the wines and liquors so used the steamers carry a stock for the use of their crews. In the case of the French, Italian and Belgian ships the law
39 of their flag requires them to supply a ration of wine and in those cases it is possible that the ships may not be able to obtain clearance unless they comply with this provision. Furthermore, the use of wines, beers or liquors among the peoples except Americans from whom the crews of all the ships are drawn, is habitual and these beverages are regarded as a necessary part of their ration.

Among the plaintiffs are two lines which sail under the American flag. These the authorities have always treated like the foreign lines; they have freely sold their wines and liquors at sea and brought them into port under the same restrictions and with the same privileges as the rest. They are now, however, subject to the same proposed action by the defendants.

The defendants are not the same in all the suits. In some cases the Secretary of the Treasury is joined, in some the United States Attorney for the Southern District of New York, and in some the Zone Officer, but the Collector of the Port of New York and the local Prohibition Director are defendants in all.

Appearances:

Hon. Van Vechten Veeder, for Oceanic Steam Navigation Co., Ltd., Liverpool, Brazil & River Plate Steam Navigation Co., Ltd. United Steamship Co. of Copenhagen, The Royal Mail Steam Packet Co., The Netherlands American Steamship Co. (Holland America Line) and Pacific Steam Navigation Company.

Lucius H. Beers, Esq., for The Cunard Seamship Co., Ltd., and Anchor Line (Henderson Brothers).

Joseph P. Nolan, Esq., for Compagnie Generale Transatlantique.

Reid L. Carr for United American Lines, et al.

Cleatus Keating, Esq., and John M. Woolsey, Esq., for International Mercantile Marine and International Navigation Co., Ltd.

William Hayward, Esq., United States Attorney, and John Holley Clark, Esq., Assistant U. S. Attorney, for Defendant in all cases.

40 LEARNED HAND, *D. J.*:

It is conceded, and indeed could not be disputed, after Grogan v. Walker and Anchor Line v. Aldridge, decided May 15, 1922, that, had the liquors here in question been a part of the ships' cargo, the bills would not lie. It makes no difference that they were not to be broached while carried within territory of the United States;

e carriage would be transportation none the less. But because they e part of the ships' stores, in the sense that that term is generally derstood, the plaintiffs argue that they do not fall within the same le. This argument rests upon two alternative premises, first, that ransportation" involves a place where, and a person to whom, the ods are to be delivered, and second, that a ship's stores have by ng custom been treated as a part of the "furniture," Brough v. hitmore, 4 Term R. 206, or "appurtenances," The Dundee, 1 gg. Adm. 109, of the ship, which do not without particular men- n become subject to the municipal law of the ports into which she ters, any more than the ship herself.

Even if "transportation" were defined to involve some delivery, I not see how that would help the plaintiffs. These liquors are rried for delivery at sea to the passengers and crew, and when so livered their transportation ends. There appears to me no sig- ficant distinction in the fact that the place of delivery is the ship elf. The passengers, and for that matter, the crew, are not the me person as the owner, and if the passage of title or possession s anything to do with the matter, the title to, and possession of, the ttle or the dram, passes when it is handed to its consumer. The rriage within the limits of the Port of New York is a part of a transit whose purpose from the beginning is that very delivery. The fact that the place and the person are undefined is as irrelevant as it would be if a collier cleared to search out d coal at sea friendly cruisers during war, as happened in 1914.

Therefore, I might admit the plaintiff's interpretation of the word, it were necessary. Nevertheless, it seems to me at best very doubt- l whether it carries with it any such limitation. The cases on ich the plaintiffs rely come only to this, that the jurisdiction of e United States under the interstate commerce clause does not minate until delivery after a transit across State lines, Gloucester rry Co. v. Pa., 114 U. S. 196, Rhodes v. Iowa, 170 U. S. 412, uisville & Nashville R. R. v. Cook Brewing Co., 223 U. S. 70, Dan- er v. Cooley, 248 U. S. 319. From this it does not follow that the m, "transportation," as used in this statute, implies delivery to other than the person who carries the liquors. Suppose, for ex- ple, a parcel of liquor, made after the Amendment, and carried to be laid away in a cache. There can be no question, I believe, at two separate crimes would be committed, "manufacture" and ansportation."

Nor does it seem to me that the thirteenth and fourteenth sections Title II of the Prohibition Act, help the plaintiffs. Under these, rriers are required to mark the consignor's and consignee's names the outside of all packages. But it does not follow that a regula- n like this of one kind of transportation imputes to the word itself y of the conditions which it enacts. In common use to transport ans to carry about, and I see no reason why it should mean less Section three. The law clearly intended by immobilizing liquor to make surreptitious traffic in it impossible and its policy would as well cover movements which might be incidental to, as those which immediately terminated in, a delivery to some-

one else. The case of Street v. Lincoln Safe Deposit Company, 254 U. S. 88, did not decide anything to the contrary; it turned upon the fact that the possession of the liquor in the leased room and in the house were both lawful, and that the movement from one to the other could not be unlawful. To apply it to the cases at bar is to beg the question, because the lawfulness of the possession here depends upon whether this is transportation under the statute. The steamers have no express warrant of law, as Street had, for the possession of the liquor. I conclude therefore that the carriage in question is "transportation."

The first point being thus disposed of, I come to the second. It is a very plausible argument to say that ship's stores ought not to fall within the general language of Section three; so plausible indeed that for three years it prevailed with the authorities charged with the enforcement of the statute. Their understanding is not to be ignored in interpreting the law itself, under well-settled canons. Since 1799 it has been recognized in the customs regulations of the United States (Revised Statutes, Sections 2795, 2796, 2797), that reasonable sea-stores shall not be subject to duty. While they must be manifested and may not be excessive in quantity, as such they are not regarded as entering into the commerce of the country. The plaintiffs say that, therefore, when Section three of the National Prohibition Act forbad- generally the transportation of liquors, it must be read in the light of this statute and the long usage under it, and that what is not within the United States for the purposes of customs ought
43 not to be so for purposes of prohibition. In addition they urge that under the maritime law it is held that for most purposes sea-stores will be treated as a part of the ship herself. If she is not regarded as being within the country, neither ought the accessories to her voyage.

It is of course true that one should not interpret a statute, and least of all a constitution, with the text in one hand and a dictionary in the other, and so courts have often held in similar cases to these. Brown v. Duchesne, 19 How. 183, Taylor v. U. S., 207 U. S. 120, Scharrenberg v. Dollar Steamship Co., 245 U. S. 122. Nevertheless, everyone must agree that the question is no more than one of interpretation, for in the cases at bar Congress certainly might, if it chose, prevent the entrance of any liquor whatever within the borders of the United States, not only under the Eighteenth Amendment, but indeed under its power over foreign commerce. It is a question, therefore, of the implied limitations upon words which literally in any event cover the case.

Grogan v. Walker, supra, and Anchor Line v. Aldridge, supra, plainly meant to adopt a broad canon for the interpretation of the National Prohibition Act, following the admonition at the end of the first paragraph of Section three. Effecting a revolutionary reform in the habits of the nation, the statute is to be understood as thorough-going in its intent to accomplish the results desired. It did not specify the extent of its application in detail, but left that to be gathered from its occasion, and the generality of the words used. It in-

tended to exercise once for all the complete power of Congress under the Amendment, and its very want of particularity is a good index that it meant to cover what it could. For this reason it is to
44 be distinguished from earlier local acts of the same kind, as for example, the Alaskan Prohibition Act, upon the language of Section twenty-nine on which the plaintiffs rely. Indeed, specification in the statute might have defeated its ends, on the theory that what was omitted must be taken as excluded. At least I cannot read the two decisions cited without supposing that it was in the foregoing sense that the Supreme Court meant section three to be read.

Starting with that premise there appears to me more reason for supposing that section to cover these ship's stores than the transportation there before the court. I say this because it was necessary to overrule at least as much, if not more, to reach the result in those decisions, and especially because there were in them much stronger reasons to imply an exception from the literal language of the act. First, in those cases there was a statute which gave as much right of transit across the territory of the United States as here, and that statute had the support of a treaty negotiated only five years later, and assumed in the opinion of Mr. Justice Holmes to be still in force. Assuming that the customs laws give a positive right to enter ship's stores into the United States, a position in itself very doubtful, since in form it only exempted them from customs duties, at least it must be conceded that the statute, old as it is, represented only the policy, and not the promise, of the nation. It is true that the custom in maritime affairs is of long standing to treat such stores as a part of the ship, but balancing that consideration with the implication against the repeal of a treaty, I cannot help believing that the second is the more weighty. At best it can only be said that the cases are on a parity in this regard.

45 However, the motives for positively assuming that such stores must be considered as included within Section three appear to me stronger than any which could apply to a bare carriage across our territory. It is true that all such reasoning as to legislative motives is speculative, but that vice, if it be one, is of the plaintiffs' making, because the language of the statute taken in its natural meaning is general and covers the case of stores, as of other merchandise. It is the plaintiffs who insist upon implying limitations on that meaning, because of the supposed intent of Congress. Since, therefore, I am asked to have recourse to implications, I cannot avoid some speculation as to what Congress would probably have said, had it been faced with the actual situation which now arises.

In the decisions cited there was no conceivable danger in the transit of liquor across the United States except the chance of its escape. It is true that as suggested in Grogan v. Walker, supra, the provision against export may have been intended to prevent the use of stimulants outside the United States and so far as it was, the argument applies with stronger force to the cases at bar. But taken substantially, the only evil which the transit could accomplish was that some of the liquor should not complete its passage. In the cases

at bar the danger of an escape is equally present, not perhaps in the case of these plaintiffs, but I cannot regard them alone. Less responsible owners may not be as scrupulous, and the law runs for all. The distinction which puts these cases within the law with much greater certainty is the purpose for which the liquors are brought and kept here. Ignoring for the moment the crews, all of
46 the stocks are avowedly intended for the consumption of those who are now within the United States, of which a substantial part are residents or citizens, the very persons whom it was the whole purpose of the Amendment to prevent drinking liquors.

Naturally I have nothing to say about the wisdom of the Amendment or the law, but, wise or not, one thing is clear, that a drink of whisky is as hurtful to health and morals outside as inside Ambrose Light. It appears to me inconceivable, when one is discussing the implied intent of Congress, that a statute cast in such sweeping terms should be read as indifferent to open preparations within the United States for the gratification by its citizens of exactly those appetites which it was the avowed intent of the statute altogether to deny. Nor do I believe that anyone would hesitate to think so who did not already repudiate the whole reform. If, for example, we were to substitute cocaine or opium for alcohol, I can scarcely think there could be any disinterested difference of opinion. Suppose it were the habit of Chinese vessels to bring to our ports among their stores a proper supply of morphine and opium with the avowed purpose of dispensing it freely to passengers from the United States as soon as they cleared the league limit. Could it be seriously argued that a constitutional amendment and a statute in broad language designed to prevent citizens from using this drug did not cover so palpable a means of nullifying the very purpose of the law? The illustration is extreme only to those who can see no parity between the evils of opium and alcohol. But a judge cannot take any position on that question; it must be enough for him that each is forbidden.

47 It is indeed different with so much of the stocks as are kept for the crews, and a much stronger argument can be made for the legality of their carriage, though these also seem to me to fall within the decisions I have so often cited. However, that question is really irrelevant as these cases are presented. The plaintiffs base their argument on the improbability that a statute in such general words should have meant to cover sea stores. This in turn rests upon the unlikelihood that what has been for so long treated as not subject to municipal law should all at once become so. But the argument breaks down as soon as it appears that the stores as a whole cannot fairly be excluded. To say that the section covered some of such stores, but not all, would be to admit that as such they were not excluded by implication. What then becomes of the argument? There are indeed cogent reasons why these might be excepted, but these are not because they are ships' stores. Congress may indeed determine to make an exception in their favor, as to the validity of which I have nothing to say, but I do not think that a judge can imply the exception because of the unquestioned diffi-

culties in which its absence leaves the plaintiffs. There is a narrow limit to judicial redrafting of statutes. Indeed, the argument was not suggested at the bar that passengers' refreshment and crews' rations stood in different positions. Probably none was intended, and I mention it only against the possibility that it might be taken later.

Cases like Brown v. Duchesne, supra, Taylor v. U. S., supra, and Scharrenberg v. U. S., supra, are all indeed in point. They illustrate the extent to which seamen and ships are regarded as enclaves
48 from the municipal law. But they were all judicial exceptions by implication out of the words of a statute, and they therefore depended upon how far in the circumstances of each case it was improbable that "the natural meaning of the words expressed an altogether probable intent." Were it not for the declaration of the Supreme Court in what I regard as far weaker circumstances, that the literal meaning of Section 3 accords with the probable intent, they might embarrass my conclusion. As it is, they do not, for in such matters each case is sui generis, and I have only to follow any decision which is apt to the statute under consideration. For these reasons I hold that the threatened action of the defendants is legal and that the bills must be dismissed.

It is obvious that this ruling disposes of the cases of the American ships as well as of the foreign. The American bills contain no allegations that the defendants intend to prosecute them for the sale of liquors upon the high seas, as for example on westward voyages. It is true that the prayers for relief do include so much, but prayers without allegations are ineffective. I do not therefore find it necessary to consider the legality of any sales of liquor under the American flag on the high seas, assuming no liquor is brought within our territorial limits. It was my understanding at the argument that the territoriality of an American ship at sea was discussed only against the possibility that I should hold that it was not illegal merely to carry liquors into and out of the Port.

I suppose that the question of a temporary restraining order pending the appeal is of a good deal more consequence to the plaintiffs than anything I may think about the law. The power under
49 the Seventy-fourth Rule to grant such an order is undoubted, notwithstanding a dismissal of the bill, Merriman River Savings Bank v. City of Clay Center, 219 U. S. 527, Staffords v. King, 90 Fed. R. 136, (C. C. A.). Moreover, the whole thing rests in the discretion of the trial judge. The question is how far the absence of any protection to the losing party will expose him to serious and irreparable damage, if in the end he wins, without imposing an equal damage upon the other party, if he holds his decree. Like all such matters, it depends upon a balance between the two, and I must assume that the chances of success are not equal.

On the one hand the plaintiffs are in unquestionable embarrassment. They must take off their stocks of liquor now in port, and if they bring any westward with them they must calculate with some nicety on the consuming capacities of their passengers or take the chances of a seizure of the residue in New York. Nevertheless so far

as the loss of the liquors themselves is concerned the damage cannot be said to be irreparable. These must be condemned before they can be forfeited, and in the present state of the calendars the cases at bar will be finally determined long before such libels can be tried. If I am wrong, the plaintiffs will get back their property after a delay which I cannot regard as an irreparable damage. If I am right, it would be obviously improper by staying the defendants to allow the liquor to escape a seizure to which the United States is entitled under its laws. With the conduct of any such proceedings I have nothing to do. It may be that the long acquiescence of the authorities in the practices here in question will moderate the ultimate penalty of confiscation; I must assume that the plaintiffs will
50 receive such consideration as the law permits, but I ought not to protect them against proceedings to which they by hypothesis would be legally subject.

However, I do not understand that they are so much concerned over the possible loss of existing stocks as over the right meanwhile to carry them in and out as a means of selling them at sea and serving them as a part of the crew's ration. If the ration is cut off, some in any case of the plaintiffs will be in a serious dilemma between two conflicting laws. The others will probably have a good deal of trouble and expense in securing seamen who will sign on upon a "dry" ship. On the other hand, foreign crews are scarcely within the dominant purpose of the Eighteenth Amendment. It appears to me just on a fair balance of the relative advantages to stay the enforcement of the law against stocks of wine and liquor necessary for crew's rations, if, honestly kept and dispensed for that purpose alone.

As to the maintenance of passengers' stocks the case is otherwise. The plaintiffs are all upon the same competitive footing inter se and only claim to fear the competition of Canadian lines. How serious that may be no one can tell, but certainly it will be felt much less during the next two or three months than at another season. In any event, on the balance of advantage I ought not to allow it. It is easy to say, if one does not take seriously the opinion behind the Amendment, that the United States will not suffer by the continuance of the status quo. But it is impossible to say so, if one does. I repeat what I said in Dryfoos v. Edwards, filed October 10, 1919, on a similar occasion. The suspension of a law of the United States, especially a law in execution of a constitutional amendment, is of itself an irreparable injury which no judge has the right
51 & 52 to ignore. The public purposes, which the law was intended to execute, have behind them the deep convictions of thousands of persons whose will should not be thwarted in what they conceive to be for the public good. No reparation is possible if it is.

Furthermore, it is at best a delicate matter for a judge to tie the hands of other public officers in the execution of their duties as they understand them, and the books are full of admonitions against doing so, except in a very clear case. Here not only is the case not clear, but, so far as I can judge, the plaintiffs have no case. Therefore I will go no further than to issue an injunction against inter-

fering with the carriage of a stock necessary for the crews' rations on the east-bound voyage. The plaintiffs must each give a bond in the sum of twenty-five thousand dollars, conditional against the use of such stocks for any other purpose than as crews' rations.

Bill dismissed with costs; injunctions as indicated pending an appeal if the same be taken at once. Settle orders on notice.

October 23, 1922.

——, *D. J.*

53 [Endorsed:] The District Court of the United States for the Southern District of New York. United American Lines, Incorporated, Atlantic Mail Corporation, American Ship and Commerce Navigation Corporation, and Shawmut Steamship Company, Complainants, against Henry C. Stuart, Acting Collector of Customs for the Port of New York; John D. Appleby, Federal Prohibition Zone Chief for the States of New York and New Jersey, and William Hayward, United States Attorney for the Southern District of New York, Defendants. Opinion. Filed October 23, 1922. Alex. Gilchrist, Jr., Clerk. Clark, Carr & Ellis, 120 Broadway, New York.

54 United States District Court, Southern District of New York.

United American Lines, Incorporated, Atlantic Mail Corporation, American Ship and Commerce Navigation Corporation, and Shawmut Steamship Company, Complainants,

against

Henry C. Stuart, Acting Collector of Customs for the Port of New York; John D. Appleby, Federal Prohibition Zone Chief for the States of New York and New Jersey, and William Hayward, United States Attorney for the Southern District of New York, Defendants.

Answer to Amended Bill of Complaint.

Now come the defendants herein and in answer to the amended bill of complaint by their attorney William Hayward, United States Attorney for the Southern District of New York, allege as follows:

First. Defendants move that the amended bill of complaint herein and divers parts thereof be dismissed, and assign the following grounds for this motion, namely:

1. The suit is in effect one against the United States and does not aver or show that the United States has consented to be sued herein.

2. The Court has no jurisdiction to grant the relief prayed for or any part thereof.

The bill does not present a cause of action in equity under the Constitution of the United States.

4. The bill does not disclose a cause of action equitable in its nature, civil in its character and arising under the Constitution of the United States.

5. The facts alleged in the bill are insufficient to constitute a valid cause of action in equity.

6. It appears from the bill that the complainant has a plain, adequate and complete remedy at law.

55 & 56 Second. Defendants deny each and every of the allegations of Paragraph "XI" of the complaint.

Third. Defendants deny those allegations of Paragraph "XIV" of the complaint herein which allege that it is lawful for complainants to sell intoxicating liquors on the high seas and in foreign ports and outside of the territorial waters of the United States, and further deny the allegation of Paragraph "XIV" that it is lawful to possess such intoxicating liquors within the territorial limits of the United States whether under seal or not.

Wherefore, defendants pray that the amended bill of complaint herein be dismissed and that the defendants have such other and further relief as to the Court may seem just and that the defendants recover their costs and disbursements herein.

WILLIAM HAYWARD,
United States Attorney for the
Southern District of New York.
Attorney for Defendants.

Office and P. O. Address: U. S. Courts & P. O. Bldg., Borough of Manhattan, City of New York.

57 [Endorsed:] E. 25/13. Form No. 336. U. S. District Court, Southern District of New York. United American Lines, Inc., Atlantic Mail Corp., American Ship & Commerce Navigation Corp., and Shawmut Steamship Company, Complainants, versus Henry C. Stuart, Acting Collector, etc.; John D. Appleby, Federal Zone Chief, etc., and William Hayward, U. S. Attorney, etc., Defendants. Answer to Amended Bill of Complaint with Notice of Entry. William Hayward, United States Attorney, Attorney for Defendants. Due service of a copy of the within is hereby admitted. New York, —, 19—. ——— —, Attorney for ———. To Clark, Carr & Ellis, Attorneys for Plaintiffs, 120 Broadway.

Answer to A/C.

SIR:

You will please take notice that an — of which the within is a copy, was this day duly entered in the within-entitled action, in

the office of the Clerk of the U. S. District Court, Southern District of N. Y.

Dated, N. Y., October 17, 1922.

Yours, etc.,

WM. HAYWARD,
U. S. Attorney, Attorney for Defendants.

58 The District Court of the United States for the Southern District of New York.

In Equity.

UNITED AMERICAN LINES, INCORPORATED, ATLANTIC MAIL CORPORATION, American Ship and Commerce Navigation Corporation, and Shawmut Steamship Company, Complainants,

against

HENRY C. STUART, Acting Collector of Customs for the Port of New York; John D. Appleby, Federal Prohibition Zone Chief for the States of New York and New Jersey, and William Hayward, United States Attorney for the Southern District of New York, Defendants.

Stipulation Amending Bill of Complaint.

It is hereby stipulated between the undersigned that paragraph IX of the bill of complaint be and hereby is amended by changing the period at the end of the paragraph into a comma, and adding the following:

"and have been accustomed to sell such intoxicating liquors to their passengers for beverage purposes upon the high seas and in foreign ports outside the territorial waters of the United States";

and that paragraph XIII of the bill of complaint be and hereby is amended to read as follows:

59 & 60 "XIII. That defendants, or some of them, have threatened to seize, or attempt to seize the intoxicating liquors now sealed as sea stores aboard the steamship Resolute and aboard the steamships Reliance, Mount Clay, Mount Carroll, and Mount Clinton upon their arrival at the Port of New York, and in case any further sales of intoxicating liquors shall be made by complainants on any of said vessels upon the high seas or in foreign ports, or in case the same shall be carried by the complainants on any of said vessels on the high seas, that the defendants, or some of them, have threatened to prosecute the complainants and to subject them to fine and imprisonment and to seize and forfeit the vessel in which the same shall be carried or sold."

CLARK, CARR & ELLIS,
Solicitors for Complainants.

WILLIAM HAYWARD,
United States Attorney for Defendants.

61 [Endorsed:] The District Court of the United States for the Southern District of New York. United American Lines, Incorporated, Atlantic Mail Corporation, American Ship and Commerce Navigation Corporation, and Shawmut Steamship Company, Complainants, against Henry C. Stuart, Acting Collector of Customs for the Port of New York, et al., Defendants. Stipulation Amending Bill of Complaint. Filed October 25, 1922. Alex. Gilchrist, Jr., Clerk. Clark, Carr & Ellis, 120 Broadway, New York, Solicitors for Complainants.

62 The District Court of the United States for the Southern District of New York.

In Equity.

UNITED AMERICAN LINES, INCORPORATED; ATLANTIC MAIL CORPORATION, American Ship and Commerce Navigation Corporation, and Shawmut Steamship Company, Complainants,

against

HENRY C. STUART, Acting Collector of Customs for the Port of New York; John D. Appleby, Federal Prohibition Zone Chief for the States of New York and New Jersey, and William Hayward, United States Attorney for the Southern District of New York, Defendants.

Bill of Complaint.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York, Sitting in Equity:

The complainants, United American Lines, Incorporated, Atlantic Mail Corporation, American Ship and Commerce Navigation Corporation, and Shawmut Steamship Company bring this, their bill of complaint, against the above named defendants, and respectfully show unto this Honorable Court as follows:

63 I. The complainant, United American Lines, Incorporated, is a corporation duly organized and existing under the laws of the State of Delaware, with an office at No. 39 Broadway, in the Borough of Manhattan, City, County and State of New York, and within the Southern District of New York, and is the operator and Managing Agent of the American steamships Resolute, Reliance, Mount Clay, Mount Carroll, and Mount Clinton.

II. The complainant, Atlantic Mail Corporation, is a corporation duly organized and existing under the laws of the State of New York, with its principal office at No. 39 Broadway, in the Borough of Manhattan, City, County and State of New York, and within the Southern District of New York, and is, and at all times hereinafter mentioned was, the owner of the American steamships Resolute and Reliance.

III. The complainant, American Ship and Commerce Navigation Corporation is a corporation duly organized and existing under the laws of the State of New York, with its principal office at No. 39 Broadway, in the Borough of Manhattan, City, County and State of New York, and within the Southern District of New York, and is, and at all the times hereinafter mentioned was, the owner of the American steamship Mount Clay.

IV. The complainant, Shawmut Steamship Company is a corporation duly organized and existing under the laws of the Com-
64 monwealth of Massachusetts, with an office at No. 30 Broadway, in the Borough of Manhattan, City, County and State of New York, and within the Southern District of New York, and is, and at all the times hereinafter mentioned was, the owner of the American steamships Mount Carrol and Mount Clinton.

V. The complainants are informed and verily believe, and therefore allege on information and belief, that the defendant, Henry C. Stuart is the Acting Collector of Customs for the Port of New York, and that the defendant, John D. Appleby is the Federal Prohibition Zone Chief for the States of New York and New Jersey, and that the defendant, William Hayward is the United States Attorney for the Southern District of New York, and that said defendants are by law charged with the duty of enforcing the provisions of the Acts of Congress and the Regulations and Decisions of the Secretary of the Treasury hereinbelow referred to, within the Port of New York.

VI. This is a suit of civil nature arising under the Constitution and laws of the United States. The matter in controversy exceeds the sum of three thousand dollars ($3,000.00) in value, exclusive of interest and costs.

VII. The complainants, Atlantic Mail Corporation, American Ship and Commerce Navigation Corporation and Shawmut Steamship Company, through their Operating Agent, the complainant,
United American Lines, Incorporated, are and have been en-
65 gaged in the business of transporting as common carriers, passengers and cargo for hire on the high seas, and since May 1922, fortnightly sailings have been maintained by the said steamships Resolute and Reliance between the port of New York and the ports of Plymouth, Boulogne, Southampton, Cherbourg and Hamburg, and for more than a year last past regular and frequent sailings have been maintained by the said steamships Mount Clay, Mount Carroll, and Mount Clinton between the ports of New York and Hamburg, and future sailings of said steamships are scheduled and have been extensively advertised, and said steamships Resolute and Reliance have been chartered for cruises between January and May, 1923; the steamship Resolute for a round-the-world cruise, and the steamship Reliance for a cruise to South America and the West Indies.

VIII. The said steamships Resolute and Reliance, Mount Clay, Mount Carroll and Mount Clinton are combined passenger and cargo ships of an aggregate value in excess of five million dollars ($5,000,000.00).

IX. The said steamships during the period of their operation by complainants have maintained and kept as part of their regular sea stores, intoxicating liquors for sale for beverage purposes upon the high seas and outside the territorial waters of the United States, under the authority of, and pursuant to regulations issued by the Treasury Department of the United States, which regulations were promulgated under authority of the National Prohibition Act.

66 X. All of said steamships have on board as part of their regular sea stores, intoxicating liquors purchased in foreign ports. All of said steamships are now in foreign ports, or on the high seas, except the steamship Resolute which is now in the Port of New York, and which has on board intoxicating liquors as part of its sea stores, sealed as required by regulations of the Treasury Department, of a value in excess of three thousand dollars ($3,000.00).

XI. The intoxicating liquor on said steamships has not been manufactured, sold, or transported within, imported into, or exported from, the United States, or any territory subject to the jurisdiction thereof, within the meaning of the Eighteenth Amendment of the Constitution and the National Prohibition Act.

XII. The Attorney General of the United States, in response to a request for an opinion as to whether the Eighteenth Amendment and the National Prohibition Act prohibited the sale, upon American ships outside the territorial waters of the United States, of intoxicating liquors acquired in foreign ports, advised the Secretary of the Treasury that said practice was illegal, and that American ships wherever located were subject to the terms of the Eighteenth Amendment and the National Prohibition Act.

XIII. The complainants believe that defendants, or some of them, will seize or attempt to seize the intoxicating liquors
67 now sealed as sea stores aboard the steamship Resolute and aboard the steamships Reliance, Mount Clay, Mount Carroll and Mount Clinton upon their arrival at the Port of New York.

XIV. Complainants are advised by counsel, and believe that it is lawful and not prohibited by the Eighteenth Amendment or the National Prohibition Act for them to sell intoxicating liquors on the high seas and in foreign ports, and outside the territorial waters of the United States when such liquors are lawfully acquired in foreign ports and maintained and kept as sea stores, and that it is lawful and not prohibited by the Eighteenth Amendment or the National Prohibition Act for intoxicating liquors so acquired to be kept as sea stores and to remain on board said steamships within the Port of New York or other United States ports under seal of the Collector of

Customs, and that there is no authority or warrant of law for the defendants to seize such intoxicating liquors.

XV. If said intoxicating liquors are seized by the defendants, the complainants will suffer irreparable damage by being deprived of said intoxicating liquors and prevented from selling the same on the high seas and in foreign ports and will further suffer irreparable damage by reason of the diversion of passenger traffic to foreign steamship companies which will continue to sell intoxicating liquors on the high seas, and the consequent impairment and depreciation of a large part of their valuable business and good will; the value of their properties as going concerns will be diminished to the irreparable damage of the complainants, and such injury and damage would be incapable of admeasurement and adjudication in an action at law.

XVI. Complainants have no adequate remedy at law and will be immediately and irreparably damaged as hereinbefore stated unless an injunction is granted.

Wherefore, the complainants pray that the Court will decree

1. That a writ of subpœna be issued herein directed to the defendants above-named, demanding that each of them on a day named, appear and answer the complaint herein, but not under oath, the oath being hereby expressly waived.

2. That the defendants, their successors, agents, servants and subordinates, and each and every one of them, be enjoined and restrained from seizing, disturbing, removing or in any way interfering with the intoxicating liquors now on board the steamship Resolute in the Port of New York as sea stores.

3. That the defendants, their successors, agents, servants and subordinates, and each and every one of them, be enjoined and restrained from arresting and prosecuting the complainants, their officers, agents, servants or employees, or any of them, or from attempting any seizure or forfeiture of any intoxicating liquors carried as sea stores on board the complainants' steamships Resolute, Reliance, Mount Clay, Mount Carroll and Mount Clinton, or of the said steamships, by reason of the fact that such intoxicating liquors may be sold on the high seas and in foreign ports and outside the territorial waters of the United States.

4. That the defendants, their successors, agents, servants and subordinates, and each and every one of them, be enjoined and restrained from enforcing or attempting to enforce, or causing to be enforced in any manner whatsoever, against the complainants, their officers, agents, servants or employees, or any of them, and/or the said steamships, any of the penalities, seizures or forfeitures provided for in the aforesaid Act of Congress or any decisions or regulations of the Secretary of the Treasury, by reason of any sale of said intoxicating liquors which may be made on the high seas or in foreign ports and outside the territorial waters of the United States.

5. That the complainants be granted a restraining order and preliminary injunction pending final hearing and decision of
70 this cause, whereby the defendants, their successors, agents, servants and subordinates, and each and every one of them, shall be enjoined and restrained, as heretofore prayed, and that upon final hearing of this cause, said injunction be made perpetual.

6. That a decree may be entered herein in favor of the complainants against the defendants aforesaid, and

7. That the complainants have such other and further relief as they may be entitled to receive and the justice of the cause may require.

CLARK, CARR & ELLIS,
Solicitors for Complainants.

Office and Post Office Address: No. 120 Broadway, Borough of Manhattan, New York City.

71 STATE OF NEW YORK,
County of New York, ss:

On the 13th day of October, 1922, before the undersigned Notary Public duly commissioned and sworn, appeared R. H. M. Robinson, who, being duly sworn, deposes and says that he is the President of United American Lines, Incorporated, and that he is the President of American Ship and Commerce Navigation Corporation, two of the complainants in the above entitled suit; that the foregoing bill of complaint is true except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true; that the reason that this verification is not made by said complainants is that said complainants are bodies corporate.

R. H. M. ROBINSON.

Sworn to before me this 13th day of October, 1922.
[SEAL.] HORACE H. POWERS,
Notary Public, Kings County.

Kings Co. Clerk's No. 255, Register's No. 8160.
N. Y. Co. Clerk's No. 413, Register's No. 8250A.
Bronx Co. Clerk's No. 25, Register's No. 68.
Queens Co. Clerk's No. 598.
Commission expires March 30, 1923.

72 STATE OF NEW YORK,
County of New York, ss:

On the 13th day of October, 1922, before the undersigned Notary Public duly commissioned and sworn, appeared A. W. Lishawa, who, being duly sworn, deposes and says that he is the Treasurer of Atlantic Mail Corporation, one of the complainants in the above entitled

suit; that the foregoing bill of complaint is true except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true; that the reason that this verification is not made by said complainant is that said complainant is a body corporate.

A. W. LISHAWA.

Sworn to before me this 13th day of October, 1922.

[SEAL.] HORACE H. POWERS,
Notary Public, Kings County.

Kings Co. Clerk's No. 255, Register's No. 8160.
N. Y. Co. Clerk's No. 413, Register's No. 8250A.
Bronx Co. Clerk's No. 25, Register's No. 68.
Queens Co. Clerk's No. 598.
Commission expires March 30, 1923.

73 & 74 STATE OF NEW YORK,
County of New York, ss:

On the 13th day of October, 1922, before the undersigned Notary Public duly commissioned and sworn, appeared E. C. Tobey, who, being duly sworn, deposes and says that he is the President of Shawmut Steamship Company, one of the complainants in the above entitled suit; that the foregoing bill of complaint is true except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true; that the reason that this verification is not made by said complainant is that said complainant is a body corporate.

E. C. TOBEY.

Sworn to before me this 13th day of October, 1922.

[SEAL.] HORACE H. POWERS,
Notary Public, Kings County.

Kings Co. Clerk's No. 255, Register's No. 8160.
N. Y. Co. Clerk's No. 413, Register's No. 8250A.
Bronx Co. Clerk's No. 25, Register's No. 68.
Queens Co. Clerk's No. 598.
Commission expires March 30, 1923.

75 [Endorsed:] The District Court of the United States for the Southern District of New York. United American Lines, Incorporated, Atlantic Mail Corporation, American Ship and Commerce Navigation Corporation, and Shawmut Steamship Company, Complainants, against Henry C. Stuart, Acting Collector of Customs for the Port of New York, et al., Defendants. Bill of Complaint. Filed October 14th, 1922. Alex. Gilchrist, Jr., Clerk. Clark, Carr & Ellis, 120 Broadway, New York, Solicitors for Complainants.

76 United States District Court, Southern District of New York.

In Equity.

25-13.

UNITED AMERICAN LINES, INCORPORATED, ATLANTIC MAIL CORPORATION, American Ship & Commerce Navigation Corporation, and Shawmut Steamship Company, Complainants,

vs.

HENRY C. STUART, Acting Collector of Customs for the Port of New York; John D. Appleby, Federal Prohibition Zone Chief for the States of New York and New Jersey, and William Hayward, United States Attorney for the Southern District of N. Y., Defendants.

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated November 9th, 1922.

CLARK, CARR & ELLIS,
Attorneys for Complainants.
WILLIAM HAYWARD,
U. S. Atty., Attorney for Defendants.

O. K.
W. J. E.

[Endorsed:] Eq. 25-13. United States District Court, Southern District of New York. United American Lines, Incorporated, et al., Complainants, vs. Henry C. Stuart, et al., Defendants. Stipulation as to Correctness of Appeal Record. Record certified November 9th, 1922. (Sgd.) Alex Gilchrist, Jr., Clerk. Clark, Carr & Ellis, Attorney- for Complainants, 120 Broadway, Borough of Manhattan, City of New York.

77 UNITED STATES OF AMERICA,
Southern District of New York, ss:

In Equity.

25-13.

UNITED AMERICAN LINES, INCORPOTATED, ATLANTIC MAIL CORPORATION, American Ship & Commerce Navigation Corporation, and Shawmut Steamship Company, Complainants,

vs.

HENRY C. STUART, Acting Collector of Customs for the Port of New York; John D. Appleby, Federal Prohibition Zone Chief for the States of New York and New Jersey, and William Hayward, United States Attorney for the Southern District of N. Y., Defendants.

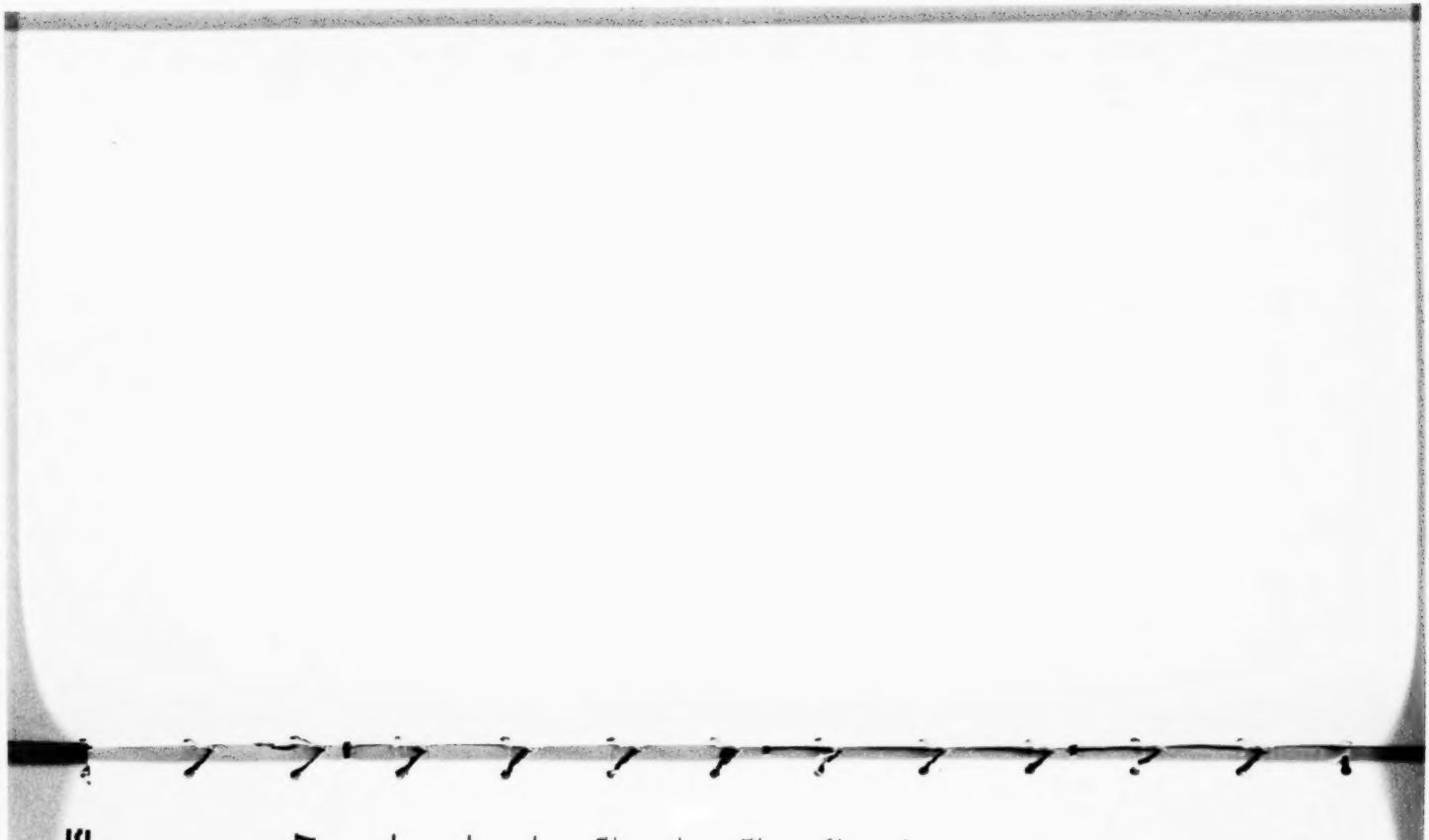
I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above entitled matter as agreed upon by the parties.

In testimony whereof I have caused the seal of the said Court to be hereunto affixed at the City of New York in the Southern District of New York this 9th day of November, in the year of our Lord one thousand nine hundred and twenty-two and of the Independence of the said United States the one hundred and forty-seventh.

[Seal of District Court of the United States, Southern District of N. Y.]

ALEX GILCHRIST, JR.,
Clerk.

Endorsed on cover: File No. 29,244. S. New York D. C. U. S. Term No. 694. United American Lines, Incorporated, Atlantic Mail Corporation, American Ship & Commerce Navigation Corporation, et al., appellants, vs. Henry C. Stuart, Acting Collector of Customs for the Port of New York; John D. Appleby, Federal Prohibition Zone Chief for the States of New York and New Jersey, and William Hayward, United States Attorney for the Southern District of New York. Filed November 10th, 1922. File No. 29,244.



IN THE

Supreme Court of the United States

October Term, 1922

THE CUNARD STEAMSHIP COMPANY, LTD., and ANCHOR LINE (HENDERSON BROTHERS) LTD., *Appellants,* *against* ANDREW W. MELLON, *et. al.,* *Appellees.*	#659.
OCEANIC STEAM NAVIGATION COMPANY, LTD., *Appellants,* *against* ANDREW W. MELLON, *et. al.,* *Appellees.*	#660.
INTERNATIONAL NAVIGATION COMPANY, LTD., *Appellants,* *against* ANDREW W. MELLON, *et. al.,* *Appellees.*	#661.
COMPAGNIE GENERALE TRANSATLANTIQUE, *Appellants,* *against* ANDREW W. MELLON, *et. al.,* *Appellees.*	#662.
THE NETHERLANDS AMERICAN STEAM NAVIGATION COMPANY (HOLLAND AMERICAN LINE), *Appellants,* *against* ANDREW W. MELLON, *et. al.,* *Appellees.*	#666.
LIVERPOOL BRAZIL AND RIVER PLATE STEAM NAVIGATION COMPANY, LTD., *Appellants,* *against* ANDREW W. MELLON, *et. al.,* *Appellees.*	#667.
THE ROYAL MAIL STEAM PACKET COMPANY, *Appellants,* *against* ANDREW W. MELLON, *et. al.,* *Appellees.*	#668.
UNITED STEAMSHIP COMPANY OF COPENHAGEN (SCANDINAVIAN AMERICAN LINE), *Appellants,* *against* ANDREW W. MELLON, *et. al.,* *Appellees.*	#669.
THE PACIFIC STEAM NAVIGATION COMPANY, *Appellants,* *against* ANDREW W. MELLON, *et. al.,* *Appellees.*	#670.
NAVIGAZIONE GENERALE ITALIANA, *Appellants,* *against* ANDREW W. MELLON, *et. al.,* *Appellees.*	#678.

BRIEF ON BEHALF OF FOREIGN STEAMSHIP LINES, APPELLANTS.

GEORGE W. WICKERSHAM,
Counsel for Appellants.

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IN THE

Supreme Court of the United States

October Term, 1922

THE CUNARD STEAMSHIP COMPANY, LTD., and ANCHOR LINE (HENDERSON BROTHERS) LTD.,	*Appellants,*	#6
against		
ANDREW W. MELLON, *et. al.,*	*Appellees.*	
OCEANIC STEAM NAVIGATION COMPANY, LTD.,	*Appellants,*	#6
against		
ANDREW W. MELLON, *et. al.,*	*Appellees.*	
INTERNATIONAL NAVIGATION COMPANY, LTD.,	*Appellants,*	#6
against		
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COMPAGNIE GENERALE TRANSATLANTIQUE,	*Appellants,*	#6
against		
ANDREW W. MELLON, *et. al.,*	*Appellees.*	
THE NETHERLANDS AMERICAN STEAM NAVIGATION COMPANY (HOLLAND AMERICAN LINE),	*Appellants,*	#6
against		
ANDREW W. MELLON, *et. al.,*	*Appellees.*	
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against		
ANDREW W. MELLON, *et. al.,*	*Appellees.*	
THE ROYAL MAIL STEAM PACKET COMPANY,	*Appellants,*	#6
against		
ANDREW W. MELLON, *et. al.,*	*Appellees.*	
UNITED STEAMSHIP COMPANY OF COPENHAGEN (SCANDINAVIAN AMERICAN LINE),	*Appellants,*	#6
against		
ANDREW W. MELLON, *et. al.,*	*Appellees.*	
THE PACIFIC STEAM NAVIGATION COMPANY,	*Appellants,*	#6
against		
ANDREW W. MELLON, *et. al.,*	*Appellees.*	
NAVIGAZIONE GENERALE ITALIANA,	*Appellants,*	#6
against		
ANDREW W. MELLON, *et. al.,*	*Appellees.*	

SEA STORES OF FOREIGN VESSELS.

Statement.

These cases come up on appeal from final decrees entered in each of ten separate causes by the District Court of the United States for the Southern District of New York, in equity (Judge LEARNED HAND sitting),

dismissing bills of complaint filed to enjoin the defendants, Mellon, Secretary of the Treasury of the United States; Stuart, Acting Collector of Customs for the Port of New York, and Day, Federal Prohibition Director for the State of New York, from enforcing against foreign steamships plying between American and foreign ports the provisions of the National Prohibition Act, as construed by the present Attorney General of the United States (Mr. Daugherty), which reversed the construction placed upon the said act by his predecessor, Attorney General Palmer, and by the General Counsel of the United States Shipping Board.

The cases were heard upon motions by the defendants, upon the amended bills of complaint and answers thereto, to dismiss the bills and motions by the plaintiffs for final decrees granting the relief prayed by the bills. The pleadings were so drawn on both sides as to raise the merits of the controversy. There is no dispute as to the facts, and the questions submitted are purely questions of law.

The Pleadings.

Substance of Bills of Complaint.

Each of the plaintiffs is a foreign corporation, owning and operating lines of steamships carrying passengers between European and American ports, the plaintiffs in Nos. 659, 660, 661, 667, 668 and 670 being British corporations, operating ships of British registry only; the plaintiff in No. 662 being a French corporation, operating ships of French registry; the plaintiff in No. 666 being a Dutch corporation, operating ships of Dutch registry; the plaintiff in No. 669 being a Danish corporation, operating vessels of Danish registry, and the plaintiff in No. 678 being an Italian corporation, operating vessels of Italian registry.

It has at all times heretofore been the practice of British vessels to carry, as part of their Sea Stores, certain wines, liquors and other intoxicating beverages for consumption by the vessels' passengers and crew, such Sea Stores, including such wines, liquors and other intoxicating beverages, being the property of the respective complainants and carried on board their ships solely for such consumption on board the vessels, and not for transportation or landing in the United States or elsewhere, and upon arrival of any vessel in the United States an accurate list of all such Sea Stores, including such wines, liquors and other intoxicating beverages, is furnished to the United States authorities (No. 659, Rec., p. 5).

The Cunard and Anchor Lines, complainants in No. 659, and the White Star Line (No. 660) operate vessels between American and Italian ports. A considerable number of the crews of such vessels plying to and from Italian ports are Italian citizens. On such vessels, plaintiffs carry many third-class passengers, and for their accommodation they must carry a number of Italian stewards. The Italian law requires that certain officers and members of the crew shall be Italian when third class Italian passengers are carried. The laws of the Kingdom of Italy also require that third-class passengers be furnished with half a liter per day of Italian wine, containing not less than twelve per cent. of alcohol, and the rules and regulations established by the Italian Seamen's Federation, which have the approval of the Government of Italy, provide that boys and young men who are members of the crew must receive not less than half a liter of wine per day of the same alcoholic content, and that all other seamen must receive three-quarters of a liter of wine per day, and that firemen and greasers, during the time the ship is under way, shall receive not less than one liter of wine per day, in each instance the wine containing twelve per cent. alcohol (No. 659, pp. 3, 4).

Under the laws of Italy, complainants' vessels cannot sail from the port of New York for an Italian port, transporting more than fifty Italian citizens as third-class passengers, unless the vessel has received a license from the Italian consul, and such license cannot be issued until the supplies and wine on board of the vessel have been tested by an inspector of immigration attached to the Italian consulate. This license cannot be issued unless there is a sufficient quantity of wine, containing not less than twelve per cent. of alcohol, on board said vessels, to furnish the third-class passengers during the voyage with the amount of wine required by the Italian law (No. 659, p. 4).

The appellant in No. 662 is a French corporation, and all of its steamships are French built vessels, registered in France, and not in the United States, and fly the French flag. The laws of the Republic of France require appellant to furnish daily to each member of the crew of each of its steamships one-half a liter of wine of alcoholic content, and to each stoker on said steamships one liter of wine of alcoholic content per day. The said allowance of wine is a part of the hire paid to each member of the crew under the terms of the French law, and by the laws of France not more than one-third the total number of a crew may be of other nationalities than France. Failure to obey these laws would subject appellant, its officers, etc., to penalties enforceable against them under the laws of France, and would result in appellant's inability to use and operate its ships (No. 662, p. 5).

All of the vessels of appellant in No. 678 are Italian vessels flying the Italian flag, its passenger ships being units of the Royal Italian Naval Reserve, registered under the Italian flag, and subject to the provisions of the Italian law, which require the steamships to furnish to the crew and passengers certain liquors containing more than one-half of one per cent. of alcohol.

The Italian Immigration Act and the Ministerial Decree of May 18, 1911, also provide that to every immigrant traveling to foreign countries, there must be given as food, among other things, one-half a liter of Italian wine of twelve per cent. alcoholic content, and for the use of the hospital on such vessels, the regulations prescribe that there must be on board for use in the ship's hospital, on the basis of 1,000 immigrants and for thirty days' voyage, * * * 24 bottles of Barola wine, * * * 24 bottles of Marsala wine, 12 bottles of cognac made from wine * * *. The same Code, Article 170, requires ships bringing third-class passengers of Italian nationality to Italy from transatlantic ports to conform to the foregoing regulations as regards food, sanitary conditions, etc. (Rec. No. 678, pp. 2, 3).

All of the alcoholic liquors carried as Sea Stores on the vessels of the respective appellants are produced and manufactured in countries other than the United States or territory subject to its jurisdiction. All such liquor for Sea Stores is taken on board the vessels of the respective appellants at European ports, and no part of such liquors is intended to be landed in the United States (No. 659, p. 5; No. 660, p. 7; No. 661, p. 4; No. 662, p. 6; No. 666, p. 5; No. 667, p. 5; No. 668, p. 5; No. 669, p. 5; No. 670, p. 5; No. 678, p. 5).

By British law, vessels are required to maintain on board for medicinal purposes certain quantities of wines and liquors (No. 660, p. 14; No. 670, p. 4).

By local regulations in force as to Dutch and Danish vessels, they are required to have on board a certain amount of liquor for medicinal and emergency use, and there are local requirements effective in several of the countries at which the vessels of appellant in No. 666 call, also necessitating the maintenance of a supply of liquors on board ship as a condition of trading with such ports (No. 666, pp. 3-4; No. 669, p. 3).

Since the adoption of the National Prohibition Act, on October 28, 1919, the ships of the respective appellants have been permitted freely to go and come in American ports carrying intoxicating liquors for beverage purposes, as Sea Stores for crew and passengers, pursuant to the following regulations of the Secretary of the Treasury (See *e. g.*, Rec. No. 659, pp. 16-17).

"(T. D. 38218.)
"Sea Stores—Liquors.

"Liquors properly listed as sea stores should be kept under seal while vessels are in port. Excessive or surplus quantities should be seized and forfeited.—Articles 106 and 107 of the Customs Regulations of 1915 as amended.

"Treasury Department, December 11, 1919.

"To Collectors of Customs and Others Concerned:

"All liquors which are prohibited importation, but which are properly listed as sea stores on vessels arriving in ports of the United States, should be placed under seal by the boarding officer and kept sealed during the entire time of the vessel's stay in port, no part thereof to be removed from under seal for use by the crew at meals or for any other purpose.

"Excessive or surplus liquor stores are no longer dutiable, being prohibited importations, but are subject to seizure and forfeiture.

"Liquors properly carried as sea stores may be returned to a foreign port on the vessel's changing from the foreign to the coasting trade, or may be transferred under supervision of the customs officers from a vessel in foreign trade, delayed in port for any cause, to another vessel belonging to the same Line or owner.

"Articles 106 and 107 of the Customs Regulations of 1915 are amended accordingly.

(Signed) JOUETT SHOUSE,
Assistant Secretary."

On January 27, 1920, the foregoing regulations were modified in accordance with an opinion of the then At-

torney General (Palmer) to read as follows (T. D. 38248):

> "All liquors which are prohibited importation, but which are properly listed as sea stores on *American* vessels arriving in ports of the United States, should be placed under seal by the Boarding Officer, and kept sealed during the entire time of the vessel's stay in port, no part thereof to be removed from under seal for use by the crew at meals or for any other purposes. All such liquors on *foreign* vessels should be sealed on arrival of the vessel in port, and such portions thereof released from time to time for use by the officers and crew.
>
> "The other provisions of T. D. 38218 are not affected by the Attorney-General's opinion, and therefore remain without modification." (See No. 659, p. 17. Italics ours.)

The opinion of the Attorney General last referred to (a copy of which is annexed to this brief at page 67) was rendered at the request of the Secretary of State, pursuant to a communication from the Italian Embassy, apparently asking that during the time of a vessel's stay in port the seal should be removed from the Sea Stores so as to permit the necessary amount of liquor required by Italian law to be served to the crew to be taken out for the use of the crew at meals. The Attorney General (Mr. Palmer) advised the Secretary of the Treasury that while the regulations in question were valid as to American vessels, the status of *foreign* vessels in American ports was different, and that he was not prepared to say that a daily distribution to the crews of foreign ships of the usual quantity for consumption on board ship so affects the peace of this country that American officials were authorized to interfere. Of course, he added:

> "the bringing of such liquors on shore even by the members of the crew to whom they are issued would be unlawful and subject the offender to

prosecution, but so long as the liquors on bo
are properly listed as sea stores and are not
cessive in quantity, I do not think their da
distribution on board the ship can properly
interfered with by this government. I am, the
fore, of the opinion that the regulations should
modified to the extent above indicated."

The bills further show, that on or about Octobe
1922, the present Attorney General of the United Sta
rendered a ruling or opinion in which, among ot
things, he held that foreign ships carrying intoxicat
beverage liquors as ships' stores within the three-
limit of the American shore, were violating the pr
sions of the National Prohibition Act, and that, th
after, the President of the United States directed
Secretary of the Treasury to proceed to the form
tion of regulations for the enforcement of such rul
The bills set forth the effect such enforcement wo
have upon the business of the respective appellants,
show the great pecuniary loss which would result
them (*e. g.*, Rec. No. 659, pp. 12-14), besides placing th
in the embarrassment of conflicting laws of other co
tries, some of which, as above stated, positively requ
the ships to carry and serve certain alcoholic bevera
for passengers and crew; and being advised that
Secretary of the Treasury and his subordinates were
paring regulations to be promulgated and enforced,
rying out the opinion of the Attorney General, last ab
referred to, and that it was the intent and threat of
defendants to seize the alcoholic liquors now constitut
Sea Stores on the vessels of the respective plaint
(some of which are now on the high seas bound to
port of New York), and to enforce against plaint
their agents, etc., the pains and penalties provided
the Act, etc., and being advised that such action wo
be in violation of law and the Constitution, these b
were filed seeking injunctions restraining the de

dants and their subordinates from in any manner enforcing or attempting to enforce against plaintiffs, their servants, etc., any of the pains, penalties or forfeitures provided in and by the respective acts of Congress, or any rules or regulations of the Secretary of the Treasury promulgated to carry into effect the said opinion of the Attorney General, or from proceeding against plaintiffs, their agents, etc., on account of any alleged violation by them of the Eighteenth Amendment or the National Prohibition Act, on the ground that the carriage of intoxicating liquors, as above mentioned, as Sea Stores for crew and passengers is contrary to law (*e. g.*, Rec. No. 659, p. 559; pp. 14-15).

Voluntary Appearance by Defendants and Answers.

The United States Attorney for the Southern District of New York appeared generally for all the defendants in each of these cases (*e. g.*, No. 659, p. 9), and filed Answers to the amended bills. The Answer in each case, after objecting (1) that the suit was against the United States, and did not show that it had consented to be sued herein, (2) that the court had no jurisdiction to grant the relief prayed for, or any part thereof, (3) that the bill did not present a cause of action in equity under the Constitution, (4) that the bill did not disclose a cause of action equitable in its nature or civil in its character and arising under the Constitution, (5) and (6) for want of equity; further answered (7) by denying the embarrassment which plaintiffs alleged they would experience in obtaining adequate crews from among the nationals of the countries in which the custom of the use of alcoholic liquors for beverage purposes is widespread, and further, that if the construction claimed by appellants were upheld, such decision would carry with it as a necessary corollary the right of any ship to transport liquor within the territorial waters of the United States; alleged the

danger of the evasion of the restrictions of the law by foreign ships, citing the example of one ship, some of whose company had broken the customs seal on liquors and had attempted to import the liquors into the United States—unsuccessfully—and finally, that if ships of foreign registry should be enabled to transport liquor within the territorial waters of the United States, the resultant damage to American merchant ships would be great and irreparable (*e. g.*, No. 659, pp. 18-21).

Decision.

On these pleadings, each side moved for judgment. The Court granted the motion of the defendants to dismiss the bills and judgments were entered accordingly (*e. g.*, No. 659, p. 30). Judge LEARNED HAND in his opinion (see No. 659, pp. 23-30) held (1) that the carriage of liquor as a part of ship stores within the waters of the United States, although not delivered to any person within those waters, was *transportation* within the meaning of the Eighteenth Amendment and the National Prohibition Act; (2) that the case of *Street* v. *Lincoln Safe Deposit Company*, 254 U. S., 88 (1920), did not apply, although:

> "It is a very plausible argument to say that ship's stores ought not to fall within the general language of Section three; so plausible indeed that for three years it prevailed with the authorities charged with the enforcement of the statute" (p. 25).

And that

> "Their understanding is not to be ignored in interpreting the law itself, under well settled canons. Since 1799 it has been recognized in the customs regulations of the United States, (Revised Statutes, Sections 2795, 2796, 2797), that reasonable sea-stores shall not be subject to duty" (p. 25).

Nevertheless, he held that in view of the canons of construction for the National Prohibition Act, adopted by this court in *Grogan* v. *Walker* and *Anchor Line* v. *Aldridge*, 42 Sup. Ct. Rep., 423 (decided May 15, 1922), the statute must be held to override any such exception and construed

> "to exercise once for all the complete power of Congress under the Amendment" (p. 25).

and to include in this exercise a prohibition of the carriage of such Sea Stores. The Court further expressed the opinion that the case was different with so much of the stocks as was kept for the crews, that a much stronger argument could be made for the legality of carriage for that purpose, although that also appeared to him to fall within the decisions cited. (See *e. g.*, No. 659, pp. 23-24, 25-28.)

The decrees, while dismissing the bills, enjoined, until final hearing and decision of the cause in this court, the defendants from seizing or interfering with the possession and carriage by plaintiffs of the stock of liquors customary for the rations of the *crew* of their vessels on eastbound voyages, upon filing a bond in the penalty of $25,000 conditioned against the gift, issuance or sale of such stock of liquors by plaintiffs otherwise than as crew's rations to crews of their vessels (No. 659, p. 30). The Court refused to enjoin during the same period, interference with the maintenance of stocks of liquor for the use of passengers under the same conditions as those applicable to liquors for rationing the crew (No. 659, p. 29). The plaintiffs respectively prayed and were allowed appeals directly to this Court from the respective decrees dismissing the bills (No. 659, p. 31).

Certain American steamship companies, engaged in operating ships of American registry, also separately filed bills in the District Court, Southern District of New York, to enjoin the United States officials from enforcing

the provisions of the Eighteenth Amendment and the statute against them, in conformity with the opinion of Attorney General Daugherty. Decrees were entered in each of these cases dismissing the bills, from which separate appeals have been prosecuted to this Court.

International Mercantile Marine Co. v. *Stuart*, No. 693;
United American Lines v. *Stuart*, No. 694.

These appeals will be argued separately from the appeals taken by the foreign steamship companies.

Judge LEARNED HAND, in the case of the American companies, held that Section 3 of Title II of the National Prohibition Act alone would be enough to cover all places where the Eighteenth Amendment could operate, but that all doubt on that point was removed by the Supplemental Act; that "territory" is not necessarily restricted to "lands" and in the amending act is equivalent to "territorial jurisdiction"; that either phrase meant to include all subjects within the power of Congress; that the exemptions respecting the Panama Canal Zone were not material, the exclusions from the operations of the Act might be permissible—Congress evidently thought they were. His conclusion was that ships of American registry, whether at sea or in a foreign port, were within the Amendment and the Act.

Assignments of Error.

1. The Court erred in holding that the Eighteenth Amendment prohibits a foreign ship from keeping on board while in the territorial waters of the United States intoxicating beverages constituting part of the customary Sea Stores of such ship, lawfully acquired by it in a foreign jurisdiction, and on board solely for the lawful use and consumption thereof on board said ship outside of the jurisdiction of the United States.

2. The Court erred in holding that the Eighteenth Amendment and the National Prohibition Act prohibit a foreign ship from keeping on board as Sea Stores while in the territorial waters of the United States such intoxicating beverages as are required for the crew as a part of their customary rations by the law of the ship's flag or by the law of the nation to or from whose ports the vessel is operating, when said Sea Stores were lawfully acquired and taken on board for such purpose in a foreign country.

3. The Court erred in holding that the Eighteenth Amendment and the National Prohibition Act prohibit a foreign ship from having on board as Sea Stores while in the waters of the United States such intoxicating beverages as are required for the passengers as a part of their customary rations by the law of the ship's flag or by the law of the nation to or from whose ports the vessel is trading, when such Sea Stores were lawfully acquired and taken on board for such purpose in a foreign country.

4. The Court erred in holding that the keeping on board of appellants' vessels of intoxicating beverages while the vessels are in the waters of the United States under the conditions above mentioned constitutes transportation of the same within the meaning of the Eighteenth Amendment and the National Prohibition Act.

5. The Court erred in holding that possession of intoxicating beverages within the territorial waters of the United States under the circumstances above mentioned is prohibited by the Eighteenth Amendment and the National Prohibition Act.

History of the Controversy.

The Eighteenth Amendment became effective January 29, 1919 (40 Stat., 1941). The National Prohibition Act, which was returned by President Wilson

without his approval, was passed over his veto by the two Houses of Congress and became a law on October 28, 1919, (41 Stat. 305). The Treasury Department, on December 11, 1919, issued its regulations, recognizing the immemorial usage of merchant ships to carry alcoholic liquors as part of their Sea Stores, and safeguarding against violation of United States laws, by providing that liquors, properly listed as Sea Stores, should be kept under seal while the vessels were in port, while excessive or surplus liquor stores were subject to seizure and forfeiture. (See *e. g.*, Rec. No. 659, p. 16).

At the instance of the Italian Embassy, requesting that during the time of the stay in port of a foreign vessel an arrangement be made whereby liquors might be withdrawn from under seal for the purpose of serving the crew—undoubtedly having in mind the provisions of the laws of Italy referred to in Rec. No. 678, pp. 2, 3, 10—Attorney General Palmer gave the opinion above mentioned (p. 67), holding that the daily distribution to crews of the usual quantity for consumption on board foreign ships did not so affect the peace of this country that American officials were authorized to interfere (32 Op. Attys. Gen. 96, 97). Whereupon, the Treasury Department promulgated the regulation of January 27, 1920, above referred to, modifying the previous regulation, by providing that all liquors properly listed as Sea Stores on foreign vessels should be sealed on the arrival of the vessel in port, and such portions released from time to time for use by the officers and crew at meals; the previous regulations otherwise to remain in force.

All foreign ships have continued to operate under these regulations. On June 8, 1922, one Adolphus Busch, of the Anheuser-Busch Brewery, in Missouri, returning to America on a ship belonging to the United States Shipping Board, addressed a letter to the President in which he commented severely upon the fact that de-

spite the rule of prohibition within the United States, liquor was freely served on ships operated by the United States Shipping Board on the high seas. This communication was referred by the President to the Chairman of the Shipping Board, who thereupon requested of the General Counsel of that Board an opinion concerning the right of American vessels, including those operated by the Shipping Board, to sell liquor outside of the three-mile limit. On June 13, 1922, Mr. Schlesinger, General Counsel of the Shipping Board, submitted a written opinion to the Chairman to the effect, that neither the Eighteenth Amendment nor the Volstead Law applies to American ships outside the three-mile limit, and, therefore, that, in his opinion, liquor might be sold on all American ships, including Shipping Board ships, beyond those limits. A copy of that opinion is annexed to this brief (p. 69). The matter was referred to the Attorney General, who, on October 6, 1922, rendered an opinion to the Secretary of the Treasury, a copy of which is annexed to this brief (p. 76), holding (1) that the Eighteenth Amendment did apply to *American* ships on the high seas outside the territorial waters of the United States, and that under his interpretation of the Volstead Act and the decisions of this court in *Grogan* v. *Walker* and *Anchor Line* v. *Aldridge*, 42 Sup. Ct. Rep., 423 (decided May 15, 1922), the sale, transportation or possession of intoxicating liquor for beverage purposes on *foreign* vessels while in American waters also was prohibited.

The application of the law to prevent even the *possession*, aside from the *use* of liquors, as a part of the Sea Stores on *foreign* ships while in American waters, so far as we are aware, had not previously been suggested by any one, but one of the arguments employed by the owners of the American ships to justify them in furnishing passengers on their ships with intoxicating liquors was, that should they not do so, the foreign ships

would have an advantage which would prevent to a large extent passengers from travelling on the American ships, and in view of this contention, the Attorney General's opinion enveloped the foreign ships equally with domestic ships in the condemnation of the act.

Upon the promulgation of this opinion, on October 7, 1922, and the announcement that the Treasury Department was preparing to issue regulations in conformity with it, these suits were brought and orders granted by District Judge LEARNED HAND, requiring the defendants to show cause why injunctions should not be issued, restraining defendants from seizing, or removing or in any way interfering with intoxicating beverages carried on complainants' ships as Sea Stores, in the manner set forth in the bill. On the return of this order to show cause, the pleadings were so framed by the parties as to present clean cut questions of law without any issue of fact, and thereupon the respective motions were made and argued, and the decrees appealed from entered.

ARGUMENT.

I.

Neither the Eighteenth Amendment, nor the National Prohibition Act, properly construed, require the application of the prohibition to every place wherever the United States may exercise its power.

The Eighteenth Amendment provides:

> "Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territories subject to the jurisdiction thereof for beverage purposes is hereby prohibited" (40 Stat., 1941).

The National Prohibition Act, Section 3 of Title II, reads as follows:

> "Sec. 3. No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented" (41 Stat., 305, 308).

Section 33 of Title II provides:

> "Sec. 33. After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title. * * * But it shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and used by him as his dwelling only and such liquor need not be reported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein; * * *." (41 Stat. 305, 317).

This statute contained no provision defining the territory within which it should be operative. It, therefore, was governed by the provisions of R. S. Section 1891:

> "The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized as elsewhere within the United States."

A question having arisen as to the jurisdiction of the courts in the territories and insular possessions of the United States to enforce the act, a section was enacted in the supplemental act of November 23, 1921, reading as follows:

> "Section 3. That this Act and the National Prohibition Act shall apply not only to the United States but to all territories subject to its jurisdiction, including the Territory of Hawaii and the Virgin Islands; and jurisdiction is conferred on the courts of the Territory of Hawaii and the Virgin Islands to enforce this Act and the National Prohibition Act in such Territory and Islands." (42 Stat. 222, 223).

An examination of the debates preceding the enactment of this statute discloses only a most perfunctory consideration of the foregoing section. It clearly appears that the dominating purpose underlying its inclusion in the act was to give power to the courts of Hawaii and the Virgin Islands to enforce the statute:

Mr. Volstead said (61st Cong. Rec., Part 3, p. 3096):

> "Section 3 simply makes this proposed law and the National Prohibition Act applicable to Hawaii and the Virgin Islands. The law is in force there, but their courts have no power to enforce it. This gives the courts of those territories power to enforce the law."

Mr. Sterling said (61st Cong. Rec., Part 4, p. 3455):

> "Section 3 of the bill simply relates to the application of the bill to the territory of Hawaii and the Virgin Islands and confers jurisdiction on the courts of that territory and those islands to enforce the provisions of this act and the National Prohibition Act."

There is nothing else in all of the many pages of the Congressional Record devoted to a discussion of these

two acts which throws any further light upon the territorial limitations of their application. Especially is there nothing to indicate that Congress was, by this act, extending the application of the law to any place not previously embraced within the description contained in the Amendment, "the United States and all the territories subject to the jurisdiction thereof." It surely is a strained construction to hold that a foreign ship temporarily within American waters is embraced within the phrase "the territories subject to the jurisdiction" of the United States. Nothing in the legislative history of the act supports the contention that Congress had any such intention.

Judge HAND, in his opinion in the American Line cases (*International Mercantile Marine* v. *Stuart, United American Lines* v. *Stuart*), says:

> "In 1920 the United States had all been organized into states and 'territory,' which meant something and which could only mean possessions acquired by conquest or purchase. To these the amendment extended by its own terms, and the question can only be what those terms meant. If they include ships of American registry, those are within it by the very language; if they do not, Congress cannot extend it to them. Ships are not in a third class."

In this, the learned Judge overlooks the fact that one territory at least—Hawaii—neither has been organized into a State, nor was it acquired by conquest or purchase, and that evidently Congress was in some doubt as to whether or not the National Prohibition Act, *ex proprio vigore*, applied to territories which had not been embodied within the United States, and, therefore, deemed it necessary specifically to extend it to such territory; and the words must be read in connection with those particular island territories described in Section 3. The Philippine Islands undoubtedly are territory subject to

the jurisdiction of the United States, yet we have not heard that the Eighteenth Amendment *ex proprio vigore* applies to them, nor that the National Prohibition Act governs them.

Moreover, Section 20 of Title III of the National Prohibition Act itself involves a recognition of the fact that the statute by its own terms did not apply to everything subject to the jurisdiction of the United States, because it specifically provides for its application to the Canal Zone—which has been defined as not a "territory" but "a place subject to the jurisdiction of the United States" (25 Op. Attys. Gen. 441), and also expressly provides that it shall not apply to liquor in transit through that zone by railroad or steamship. The section is as follows:

> "Section 20. That it shall be unlawful to import or introduce into the Canal Zone, or to manufacture, sell, give away, dispose of, transport, or have in one's possession or under one's control within the Canal Zone, any alcoholic, fermented, brewed, distilled, vinous, malt or spirituous liquors, except for sacramental, scientific, pharmaceutical, industrial, or medicinal purposes, under regulations to be made by the President, and any such liquors within the Canal Zone in violation hereof shall be forfeited to the United States and seized: *Provided*, that this section shall not apply to liquor in transit through the Panama Canal or on the Panama Railroad" (41 Stat., 305, 322).

Judge Learned Hand, in the American Line cases, dismisses this exemption in the following language:

> "Nor is the exemption of the Canal Zone material. Congress has indeed shown that it supposed it could exclude certain transportation from the amendment and perhaps Congress is right. Even so, no inference can be made that it thought the amendment did not apply before it had acted, and if it could, with all deference the supposition would be in error."

It is somewhat difficult to understand why if Congress was right in supposing it could exclude transportation of liquors from the application of the amendment under any circumstances, it could not exclude it by failure specifically to include, as well as by an exception expressly grafted on to a comprehensive inclusion.

In our view, Section 20 of Title III involves the expression of an important recognition by Congress that it has power under the amendment to exclude from the operations of prohibition in some instances, and if that be true, the words *"territory subject to the jurisdiction thereof"* in the Eighteenth Amendment cannot mean *"wherever the United States may exercise its power,"* as contended by the Government.

The conclusions announced by this Court in the *National Prohibition Cases*, 253 U. S., 350 (1920), are not at variance with this view. It was there declared (p. 386):

> "6. The first section of the Amendment—the one embodying the prohibition—is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers and individuals within those limits, and of its own force invalidates every legislative act—whether by Congress, by a state legislature, or by a territorial assembly—which authorizes or sanctions what the section prohibits."

"The entire territorial limits of the United States" does not include "all places subject to its jurisdiction."

Nor do we think that *Grogan* v. *Walker* and *Anchor Line* v. *Aldridge*, 42 Sup. Ct. Rep., 423 (decided May 15, 1922), properly construed are at variance with our view. Indeed, Mr. Justice HOLMES, in the prevailing opinion says (p. 424):

> "The Eighteenth Amendment meant a great revolution in the policy of this country, and presumably and obviously meant to upset a good many

> things on as well as off the statute book. It did not confine itself in any meticulous way to the use of intoxicants in this country. It forbade export for beverage purposes elsewhere. * * * It is obvious that those whose wishes and opinions were embodied in the amendment meant to stop the whole business. They did not want intoxicating liquor in the United States and reasonably may have thought that if they let it in some of it was likely to stay. When, therefore, the amendment forbids not only importation into and exportation from the United States but transportation within it, the natural meaning of the words expresses an altogether probable intent. The Prohibition Act only fortifies in this respect the interpretation of the amendment itself. The manufacture, possession, sale and transportation of spirits and wine for other than beverage purposes are provided for in the act, but there is no provision for transhipment or carriage across the country from without. When Congress was ready to permit such a transit for special reasons, in the Canal Zone, it permitted it in express words. Title 3, §20, 41 Stat. 322."

We have here at least a tacit recognition that Congress had the right to permit transportation within its jurisdiction for some purposes and under some circumstances. This language was used in support of the decision in *Grogan* v. *Walker* (1) that the act forbade the carriage by rail through the United States of intoxicating liquors shipped in bond from a point in Canada to a point in Mexico, Central or South America, and (2) in *Anchor Line* v. *Aldridge*, that it also prohibited the transshipment of whiskey from one British ship to another in the harbor of New York, although the whiskey was consigned from a port in England to one in South America, and merely was carried through the port and city of New York.

Anchor Line v. *Aldridge* was decided on bill and answer. The bill sought to enjoin the seizure of ship-

ments of intoxicating liquors coming into the Port of New York on foreign steamships, consigned through to British possessions in the West Indies, and intended to be transshipped from one vessel to another within American territory. The answer contains allegations respecting this transportation which were admitted by the motion for judgment on the pleadings. Article Eighth of the Answer (Rec., p. 26), reads as follows:

> "Eighth. On information and belief, that in all cases of such liquors arriving by vessel, the responsibility of the importing vessel appears to cease forty-eight hours after the landing of the shipment or upon the actual delivery to a Government truckman or lighterman. That such intoxicating liquors are frequently to be exported by a vessel berthed at a different dock and schedule—to sail sometimes as much as twelve days after the landing of the importing vessel, and that in some cases the dock from which the exporting vessels sail is as much as six or seven miles by land or water from the berth of the incoming vessel, as for instance where shipments arriving on the Anchor Line at Pier 64, North River, at West 23rd Street, New York City, are destined to be exported by a vessel sailing from the piers of the Bush Terminal in South Brooklyn, N. Y. That in all cases there elapses some time, of perhaps a day or more, and there is involved some carriage by land or water or both, and that such lapse of time and necessity of carriage in this port has subjected such liquors to pilferage, loss and other unlawful disposition, with the result that large quantities of such liquor enter into consumption for beverage purposes in the United States."

This undoubtedly was "transportation" within the United States. The District Court (Mayer, D. J.), held that Congress had plenary power to prohibit the transportation of liquor for beverage purposes, even though the liquor was destined for some place outside the United

States or territory subject to the jurisdiction thereof, and that by the National Prohibition Act, it had prohibited such transportation, and this Court concurred in that opinion. This presents a state of facts radically different from those under consideration in the case at bar.

This decision, and even the language of the prevailing opinion in this court, which would seem to go beyond the necessities of the decision in its broad construction of the act, is not conclusive on the question whether or not the act prohibits foreign ships from bringing within the waters and ports of the United States spirituous liquors as a part of their Sea Stores for the use of their crew and passengers, in conformity with the established usage of commerce and under regulations such as those which have prevailed under the authority of the United States since 1799.

In adopting the broad canon of construction which controlled the decision rendered by this court in *Grogan* v. *Walker* and *Anchor Line* v. *Aldridge (supra)*, it is evident that the Court placed emphasis upon the controlling force of the admonition contained in Section 3 of Title II of the National Prohibition Act enjoining liberality of construction, to the end that the use of intoxicating liquor as a beverage might be prevented. Let us consider what meaning and purpose are to be assigned to the Eighteenth Amendment and the enforcing act. Certainly the first sense of every law must be that the field of its operation is the country of its enactment. This is equally true of the Eighteenth Amendment and the National Prohibition Act. Necessarily, they get their meaning from the field and purpose of their operation—from the conditions which exist in the field or are designed to be established there. The transportation that they prohibit is transportation within that field—that is, the United States and its Territories "for beverage purposes." The transportation and the purposes are, therefore, complements of

each other and both must exist to fulfill the declared prohibition. Thus considered, the "admonition" which received such emphasis in the adoption of this broad canon of construction, and was relied upon by the lower court herein, loses all force under the circumstances of the instant case. Liberality of interpretation is enjoined to the end "that the use of intoxicating liquor as a beverage" may be prevented. These words carry with them an unspoken but necessary qualification, namely, "within the United States, its Territories, Hawaii, and the Virgin Islands."

We have said that the transportation and purposes are complements of each other and both must exist to fulfill the required prohibition. The foreign steamship lines do not seek to transport liquor through, for use as a beverage within, the United States, its Territories, Hawaii, or the Virgin Islands.

II.

A foreign ship temporarily within the waters of the United States is not "territory subject to the jurisdiction" of the United States, within the meaning of the Eighteenth Amendment and the National Prohibition Act.

The jurisdiction exercised by a State over foreign vessels within her waters has been the subject of much controversy.

On the one hand, it is held that, in a sense, the vessel is part of the territory of the nation to which it belongs, and those on board are subject to its laws, even in a foreign port (*Vattel*, book 1, c. 19, §216; *Wheat. Int. L.*, 157; *Brown* v. *Duchesne*, 19 How., 183; *Wilson* v. *McNamee*, 102 U. S., 572 (1880); *U. S.* v. *Bowman*, decided November 13, 1922, No. 69), while on the other hand, it is

held, with certain reservations, that by voluntarily coming into the waters or ports of one nation, the ships of another submit themselves to the laws of the former (*U. S.* v. *Diekelman*, 92 U. S., 520 (1875), *Wildenhus's Case*, 120 U. S., 1 (1887); *The Exchange* v. *McFaddon*, 7 Cranch, 116, 144 (1812).

Professor Moore (2, Dig. Int. Law, p. 292), adopts the rule contained in Attorney General Cushing's opinion given in 1856 (8 Op. Attys. Gen. 73), to the effect that:

> "The local port authority has jurisdiction of acts committed on board of a foreign merchant ship while in port, provided those acts affect the peace of the port, but not otherwise; and this jurisdiction does not extend to acts internal to the ship, or occurring on the high seas."

H. Taylor, International Public Law (1901), Sec. 268, says:

> "As Mr. Webster said in the case of *The Creole*, 'the rule of law and the comity and practice of nations allow a merchant vessel coming into any open port of another country voluntarily, for the purpose of lawful trade, to bring with her and keep over her to a very considerable extent the jurisdiction and authority of the laws of her own country. A ship, say the publicists, though at anchor in a foreign harbor, possesses its jurisdiction and its laws * * *.'"

Wheaton's Int. Law, 5th Eng. Ed., 1916; by Coleman Phillipson, page 169, says:

> "Generally speaking, we may now say that, though the municipal law of different States varies more or less on this question, private vessels when in foreign ports and waters enjoy exemption from the local jurisdiction in regard to such offences as affect simply the crew or the internal discipline of the vessel, and also to those delinquencies that do not involve a breach of the peace of the port."

In II Wharton's Conflict of Laws, 3rd Ed., Rochester, 1905, the author says:

"§816. * * * Every state is internationally entitled to take cognizance of offences on board its own ships wherever they may be.

"§817. * * * The state having territorial jurisdiction over the port has a concurrent jurisdiction; but the prevalent opinion is, that unless the peace of the port is disturbed, the territorial government will not take cognizance of an offense committed on board a foreign ship, the parties being exclusively foreigners."

Alexander Porter Morse, in an interesting and learned essay entitled "Is There a Law of the Flag, as Distinguished From the Law of the Port, in Respect to Merchant Vessels in Foreign Waters?" published in 1890, reviews the authorities on the subject and reaches the conclusion that

> "By usage and under recognized principles of modern international law, and in the absence of treaty and statute provisions, there is a law of the flag in respect to merchant vessels, which is exclusive of the law of the port."
>
> 42 Albany L. J., pages 345, 353.

In 1884, Mr. Frelinghuysen wrote to Mr. Randall as follows:

> "A merchant vessel in port is within the jurisdiction of the country owning the port with references to offenses committed on shore or by any member of the crew on board when the peace of the port is disturbed."
>
> (Cited in 42 Albany L. J., p. 350.)

Mr. Morse points out that Heffler, Phillimore, Twiss and Hall maintain the doctrine of exclusive local jurisdiction, while Webster, Wheaton, Bluntschli, Ortolan, Calvo, Halleck, Dana, Bar, Negrin, Massé and Lawrence maintain that there is a law of the flag which is some-

times of exclusive and sometimes of concurrent jurisdiction.

> "This government," wrote Secretary Marcy to the British Minister (Crampton), on April 19th, 1856, "does not apply the doctrine of extra-territoriality to its private or merchant ships in foreign ports, *except in cases where it has been conceded by treaty or established usage* * * * "
> 42 Albany L. J., p. 350. (Italics ours.)

OPPENHEIM states that it is agreed by all authorities that a foreign merchantman and the persons thereon fall under the jurisdiction of the littoral state in case peace and order outside the ship are disturbed or persons other than the crew or passengers are affected. But, he adds:

> "But many writers maintain, and the practice of France and some other States supports their view, that the littoral State has no jurisdiction in case only the internal order of the ship is affected, or the relations between members of the crew or passengers are alone concerned. However, there is no rule of International Law which limits jurisdiction to this extent, and it can therefore claim jurisdiction in all matters over such merchantmen and the persons thereon as have cast anchor within the maritime belt or entered a port. On the other hand, the littoral State is not compelled to exercise such jurisdiction, and many States have therefore by commercial and consular treaties stipulated that in such cases as those in which the internal order of the ship is alone concerned, jurisdiction should be exercised, not by the littoral State, but by the home State through its consul. * * * "
>
> (Oppenheim, International Law (1920), Vol. 1, 3rd Ed., §189.)

To the same effect is Ortolan, *Diplomatie de la Mer*, Vol. 1, pages 192-193.

Dr. Charles N. Gregory, in an article read to the International Law Association at its meeting at Antwerp on September 29, 1903, printed in 2 Michigan Law Review, page 333, summarizes the law on this subject under seven distinct conclusions, of which the third is as follows:

> "That as to vessels belonging to private owners in foreign territorial waters jurisdiction attaches, whether those waters are enclosed or littoral, very much at the discretion of the local state, but with a constant practice in local authorities to refuse jurisdiction if the ship and its company are alone affected."

Halleck (International Law [1908], 4th Ed., by Baker, Vol. I, pp. 245-246), says that the rule of law and the comity and practice of nations

> "allow a merchant vessel of one State coming into an open port of another, voluntarily, for the purposes of lawful trade, to bring with her, and keep over her, to a very considerable extent, the jurisdiction and authority of the laws of her own country, excluding, to this extent, by consequence, the jurisdiction of the local law. This jurisdiction of a nation over its vessels, while lying in the port of another, is [not]* wholly exclusive. For any unlawful acts done by her while thus lying in the port of another State and for all contracts entered into while there, by her master or owners, she is made answerable to the laws of the place. Nor, if her master or crew, while on board in such port, break the peace of the community by the commission of crimes, can exemption from the local laws be claimed for them. But the comity and practice of nations have established the rule of international law that such vessel so situated is not, as termed by Lord Stowell, a 'mere movable,' but that she is for the general purpose of governing and regulating the rights, duties and obligations of

*The omission of the word "not" is evidently a printer's error.

> those on board, to be considered under the jurisdiction of, and a part of the territory of, the nation to which she belongs. The local authorities, therefore, have a right to enter on board a foreign merchantman in port, for the purpose of enquiry universally, but, according to Ortolan and Massé, for the purpose of arrest only in matters within their ascertained jurisdiction."

This doctrine is cited and approved by Dana (Wheaton's Elements of Int. Law, 8th Ed., 1866, sec. 95, note 58).

In *Wildenhus's Case*, 120 U. S., 1, 12 (1887), it was decided that the local authorities of this country have jurisdiction over the crime of felonious homicide committed on board a foreign merchant vessel within the port of the United States, and that the Circuit Court might issue a writ of *habeas corpus* to determine whether one of the crew of such vessel in the custody of the state authorities, charged with the commission of the crime, is exempt from local jurisdiction under treaty provisions. In discussing the limits beyond which local jurisdiction would not be applicable in the case of merchant vessels voluntarily in our ports, Mr. Chief Justice WAITE said (p. 12):

> "From experience, however, it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship, and the general regulation of the rights and duties of the officers and crew towards the vessel or among themselves. And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquility of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require."

With respect to criminal matters, Halleck states the judicial power of the state extends, with certain qualifications, *i.e.*, to the punishment of all offenses, by whomsoever committed, on board its public or private vessels on the high seas and on board its public vessels and in some cases on board its merchant vessels in foreign ports. (International Law, 4th Ed., Vol. I, p. 247.) This jurisdiction was recently upheld in this court in the case of *United States* v. *Bowman*, decided November 13, 1922, where the Court said, speaking by the Chief Justice:

> "We cannot suppose that when Congress enacted the statute or amended it, it did not have in mind that a wide field for such frauds upon the Government was in private and public vessels of the United States on the high seas and in foreign ports and beyond the land jurisdiction of the United States, and therefore intended to include them in the section" (Adv. Op., p. 7).

That decision, reversing the District Court, upheld an indictment for conspiracy to defraud the Fleet Corporation, in which the United States is a stockholder, laying the offense, in part, on the high seas and, in part, at the port of Rio Janeiro in the Republic of Brazil.

III.

The courts will never give a construction to a statute contrary to international law or the accepted custom and usage of civilized nations, when it is possible reasonably to construe it in any other manner.

The Paquete Habana, 175 U. S., 677 (1900);
Murray v. *Schooner Charming Betsy*, 2 Cranch, 64, 118 (1804).

The same rule, *a fortiori*, should apply to the construction of a provision in the Constitution. Presumably, provisions of the latter are not intended to regulate the affairs of foreign nations or to upset established international usage. If, as we contend, the Amendment does not foreclose the question, then it becomes one of statutory construction, namely, whether Congress intended to disregard the long established general rule respecting the jurisdiction of the country of a visiting ship over its internal affairs and to impose its will with respect to such internal management, in cases which cannot in any respect be considered as affecting the peace and order of the port in which the ships come. In construing other statutes which might affect such internal management, the Federal courts have been careful to avoid, unless constrained by the obvious, inescapable meaning of the act, giving such construction to the statute as would lead to a conflict of laws, or interference with well settled international usage or unduly to interfere with the internal management of the ship.

In *Schooner Exchange* v. *McFaddon*, 7 Cranch, 116, 136 (1812), Chief Justice MARSHALL said:

> "All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.
>
> "This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory.
>
> "The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and com-

plete jurisdiction within their respective territories which sovereignty confers.

"This consent may, in some instances, be tested by common usage, and by common opinion, growing out of that usage.

"A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world."

In the case of *The Charming Betsy (supra)*, Chief Justice MARSHALL said (p. 118):

"It has also been observed that an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and, consequently, can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.

"These principles are believed to be correct, and they ought to be kept in view in construing the act now under consideration."

In an early case—*The Brig Wilson* v. *United States*, Fed. Cas. No. 17,846, 1 Brockenbrough, 423 (1820)—decided on the circuit in 1820, by Chief Justice MARSHALL, an act of Congress (February 28, 1803; 2 Stat. 205, L. & B. Edition) forbade any master or captain of a ship or vessel, to *import* or *bring* into any port or place of the United States, any negro, mulatto, or other person of color, where the admission or importation of such persons was prohibited by the laws of the State in which such port was situated. It was held that this act did not apply to colored seamen, employed in navigating the vessel.

"I have contended," said the Chief Justice (p. 245), writing on this branch of the case, "that the power of congress to regulate commerce, compre-

> hends, necessarily, a power over navigation, and warrants every act of national sovereignty, which any other sovereign nation may exercise over vessels, foreign or domestic, which enter our ports. *But there is a portion of this power, so far as respects foreign vessels, which it is unusual for any nation to exercise, and the exercise of which would be deemed an unfriendly interference with the just rights of foreign powers.* An example of this would be, an attempt to regulate the manner in which a foreign vessel should be navigated in order to be admitted into our ports; and to subject such vessel to forfeiture, if not so navigated. *I will not say, that this is beyond the powers of a government, but I will say, that no act ought to have this effect given to it, unless the words be such as to admit of no other rational construction.*" (Italics ours.)

To the same effect was the decision in *Brown* v. *Duchesne*, 19 How., 183 (1856), where it was held that the right of property and exclusive use granted to a patentee do not extend to a foreign vessel lawfully entering one of our ports; and the use of such improvement in the construction, fitting out, or equipment, of such vessel, while she is coming into or going out of a port of the United States, is not an infringement of the rights of an American patentee, provided it was placed upon her in a foreign port, and authorized by the laws of the country to which she belongs.

Chief Justice TANEY said (p. 194):

> "This question depends upon the construction of the patent laws. * * *
>
> "The general words used in the clause of the patent laws granting the exclusive right to the patentee to use the improvement, taken by themselves, and literally construed, without regard to the object in view, would seem to sanction the claim of the plaintiff. But this mode of expounding a statute has never been adopted by any enlightened tribunal—because it is evident that in many cases it would defeat the object which the Legislature intended to accomplish."

The Court said that the power to grant patents vested in Congress by the Constitution

> "is domestic in its character, and necessarily confined within the limits of the United States. It confers no power on Congress to regulate commerce, or the vehicles of commerce, which belong to a foreign nation, and occasionally visit our ports in their commercial pursuits. That power and the treaty making power of the General Government are separate and distinct powers from the one of which we are now speaking, and are granted by separate and different clauses, and are in no degree connected with it. And when Congress are legislating to protect authors and inventors, and their attention is necessarily attracted to the authority under which they are acting, and it ought not lightly to be presumed that they intended to go beyond it, and exercise another and distinct power, conferred on them for a different purpose" (p. 195).

The Chief Justice pointed out that the principal and almost the only advantage which the defendant derived from the use of the patented improvement was on the high seas, and in other places out of the jurisdiction of the United States; that so far as the mere use was concerned, the vessel could hardly be said to use it while she was at anchor in the port, or lay at the wharf; that patent laws did not embrace improvements on foreign ships lawfully made in their own country which had been patented here; that cases of that kind were not in the contemplation of Congress in enacting the patent laws, and could not, on any sound construction, be regarded as embraced in them. Such a construction, instead of conferring legal rights on the inventor, among other things, would serioulsy impair the commerce of the country with foreign nations.

> "We think these laws ought to be construed in the spirit in which they were made—that is

> founded in justice—and should not be strained by technical constructions to reach cases which Congress evidently could not have contemplated without departing from the principle on which they were legislating and going far beyond the object they intended to accomplish" (p. 197).

The Dingley Act, enacted June 26, 1884, entitled "An Act to remove certain burdens on the American merchant marine and encourage the American foreign carrying trade and for other purposes" (23 Stat., 53), made it unlawful in any case to pay any seaman wages before leaving the port at which such seaman may be engaged, in advance of the time when he has actually earned the same, etc. This section, it was declared, "shall apply as well to foreign vessels as to vessels of the United States * * * ." (Sec. 10, p. 56).

In *The State of Maine*, 22 Fed., 734 (1884), BROWN, J., held in the United States District Court for the Southern District of New York, that the statute did not apply to the case of the shipment of seamen at Antwerp on an American ship being at anchor there. It was held that

> "the shipment of seamen in a foreign port, and the payment either of advance wages or of bills previously incurred, as in this case, as an advance of wages, are acts done and completed wholly upon foreign soil; and therefore wholly beyond the jurisdiction of this country" (p. 735).

It appeared that the men were shipped in Antwerp under the supervision of the American consul at that port, and the bills were paid by the captain through him. BROWN, J., said:

> "If American vessels be treated as a part of the territory of the United States, and within its jurisdiction, though in foreign ports, still, acts like the present, that are not done upon shipboard, but, as I have said, are completed upon land prior to the seamen's coming aboard, and as a means of

> procuring them to do so, would not be done within the territorial jurisdiction of this country" (p. 735).

In *The Kestor*, 110 Fed., 432 (D. C., D. Del., 1901), there was submitted for construction to the U. S. District Court of Delaware an amendment to the Dingley Act above referred to, passed December 21, 1898 (30 Stat. 755), by Section 24 of which it was made unlawful in any case to pay any seamen wages in advance of the time when the same were actually earned, and it was provided that any such payment should not absolve the vessel or the master from full payment of the wages after the same were earned, and

> "(f) That this section shall apply as well to foreign vessels as to vessels of the United States; and any master, owner, consignee or agent of any foreign vessel who has violated its provisions shall be liable to the same penalty that the master, owner or agent of a vessel of the United States would be for a similar violation: Provided, That treaties in force between the United States and foreign nations do not conflict" (30 Stat. 763).

Finding that there was no treaty between the United States and Great Britain inconsistent with such application, in view of this specific language, the Court (BRADFORD, J.) held that the statute was intended to apply to the case of British subjects shipping to the United States on British vessels, and that it did so apply. It was pointed out that this statute expressly amended the earlier act and was intended to be applicable, except in cases where an existing treaty conflicted, to cases of foreign seamen shipping in our ports on foreign merchantmen, as well as to American seamen shipping in our ports on either domestic or foreign ships. It also was pointed out that the prepayment of wages for which credit was claimed in the instant case was made in the port of Baltimore

and, consequently, within the territorial jurisdiction of the United States, and that therefore it was within the power of Congress to exercise jurisdiction over such payment, which had been done, specifically by the language of the statute under consideration.

In the case of *Patterson* v. *The Eudora*, 190 U. S., 169 (1903), it appeared that the appellants shipped on board the Bark *Eudora*, to serve as seamen for a direct voyage from Portland, Maine, to Rio and other points, the final port of discharge to be in the United States or Canada. The questions certified were whether the Act of Congress of December 21, 1898 (30 Stat. 755), referred to in *The Kestor (supra)*, was properly applicable to the contract made in that case, and whether under the agreed statement of facts, upon a libel filed by said seamen after the completion of the voyage, against a British vessel, to recover wages which were not due them under the terms of their contract or under the law of Great Britain, the libellants were entitled to a decree against the vessel. Both these questions were answered in the affirmative. It was remarked by the Court that it did not appear that the contract of shipment or the advance payment was made *on board the vessel*. On the contrary, the stipulated fact was that the "seamen were engaged in the presence of the British vice consul at the port of New York" (p. 176). As to that, the Court said, "*The wrongful acts were therefore done on the territory and within the jurisdiction of the United States*" (p. 176; italics ours). Mr. Justice BREWER, in delivering the opinion of the Court, said (p. 176):

> "It is undoubtedly true that, for some purposes, a foreign ship is to be treated as foreign territory. As said by Mr. Justice BLACKBURN, in *Queen* v. *Anderson*, L. R., 1 Crown Cases Reserved, 161, 'A ship, which bears a nation's flag, is to be treated as a part of the territory of that nation. A ship is a kind of floating island.' Yet when a foreign

> merchant vessel comes into our ports, like a foreign citizen coming into our territory, it subjects itself to the jurisdiction of this country."

The Court cited *Schooner Exchange* v. *McFaddon,* 7 Cranch, 116, 136, 146 (1812) and *Wildenhus's Case,* 120 U. S., 1, 11, 12 (1887) and continued as follows:

> "It follows from these decisions that it is within the power of Congress to prescribe the penal provisions of section 10, and no one within the jurisdiction of the United States can escape liability for a violation of those provisions on the plea that he is a foreign citizen or an officer of a foreign merchant vessel. It also follows that it is a duty of the courts of the United States to give full force and effect to such provisions. * * * The implied consent of this government to leave jurisdiction over the internal affairs of foreign merchant vessels in our harbors to the nations to which those vessels belong may be withdrawn. Indeed, the implied consent to permit them to enter our harbors may be withdrawn, and if this implied consent may be wholly withdrawn, it may be extended upon such terms and conditions as the government sees fit to impose. And this legislation, as plainly as words can make it, imposes these conditions upon the shipment of sailors in our harbors, and declares that they are applicable to foreign, as well as to domestic, vessels. Congress has thus prescribed conditions which attend the entrance of foreign vessels into our ports, and those conditions the courts are not at liberty to dispense with. The interests of our own shipping require this" (p. 178).

This *decision,* it will be noted, was limited to a case where the seamen were shipped and the advance payment made on shore, within the territorial limits of the United States, to wit: in the City of New York.

In *Sandberg* v. *McDonald,* 248 U. S., 185 (1918), the Court had before it a later statute on the same subject, entitled, in part, "An Act To promote the welfare of American seamen in the merchant marine of the United

States," enacted in 1915 (38 Stat. 1164), section 10 of which, repeating the prohibition of advance payment of seamen's wages, specifically provided:

> "(e) That this section shall apply as well to foreign vessels while in waters of the United States, as to vessels of the United States, and any master, owner, consignee, or agent of any foreign vessel who has violated its provisions shall be liable to the same penalty that the master, owner, or agent of a vessel of the United States would be for similar violation."

It appeared that the libelants shipped upon The *Talus*, a British ship, at Liverpool, where they received certain advances made to them by the ship or its agents, "a practice usual and customary and not forbidden by the laws of Great Britain" (p. 191). They boarded the ship at Dublin, Ireland, and left her at Mobile, Alabama, where they demanded of the master of the ship payment of their wages, and upon receiving the amount which they had earned, less the amounts paid to them upon shipping, as aforesaid, libelled the ship, claiming the benefit of the statute above cited. A majority of the court, speaking through Day, J., held that, by the statute in question, Congress did not intend to make invalid the contracts of foreign seamen, so far as the advance payment of wages is concerned, when the contracts and payment were made in a foreign country where the law sanctions such contract and payment.

> "Had Congress intended to make void such contracts and payments," said the Court at page 195, "a few words would have stated that intention, not leaving such an important regulation to be gathered from implication. There is nothing to indicate an intention, so far as the language of the statute is concerned, to control such matters otherwise than in the ports of the United States."

So it may with equal force be said that if Congress had intended to extend the prohibition of the possession of intoxicating liquors on foreign merchant ships within American waters as ship stores in conformity with established usage it would have so stated that intention in unmistakable language "not leaving such an important regulation to be gathered from implication."

Stress was laid in *Sandberg* v. *McDonald, supra,* upon the limitation of the application of the statute by its own provisions, "as well to foreign vessels *while in the waters* of the United States as to vessels of the United States" (p. 194).

> "Legislation," said the court, "is presumptively territorial and confined to limits over which the law-making power has jurisdiction. *American Banana Co.* v. *United Fruit Co.* 213 U. S. 347 (1909), 357. In *Patterson* v. *Bark Eudora, supra* [190 U. S. 169] this court declared such legislation as to foreign vessels in United States ports to be constitutional. We think that there is nothing in this section to show that Congress intended to take over the control of such contracts and payments as to foreign vessels except while they were in our ports. Congress could not prevent the making of such contracts in other jurisdictions" (pp. 195-196).

There was a vigorous dissent from this decision by four of the Justices, who contended that the statutes under consideration expressed something more than the particular relations of ship and seaman.

> "They express the policy of the United States which no private conventions, no matter where their locality of execution, can be adduced to contravene" (p. 201).

They maintained that if the foreign vessel be in the waters of the United States, every provision of the act applies to it as far as it can apply, and that it gives the

right to seamen on a foreign vessel to demand from the master one-half part of the wages which they shall have earned at every port, and makes void all stipulations to the contrary, and, therefore, when the foreign vessel came into the United States port, the seamen had a right to recover the amount of wages earned up to that time without crediting advances made to them in the foreign ports, and to hold the ship and its master liable in the United States courts for such amount. But the majority of the Court gave the act effect only to the limit compelled by its language.

In *Neilson* v. *Rhine Shipping Co.*, 248 U. S., 205 (1918), the libelants shipped on the American bark *Rhine*, at Buenos Ayres on a voyage to New York. It was stipulated that the shipping of seamen on sailing vessels at Buenos Ayres was controlled by certain shipmasters, to one of whom the libelants, in accordance with the usual custom and as a means of securing employment, signed a receipt or advance note for one month's wages. These advance notes were presented to the American Vice Consul at Buenos Ayres before the libelants signed the articles, were by him noted on the articles, and in the presence of libelants directed to be paid on account of the wages of the respective libelants. It was further stipulated that in directing the master of the *Rhine* to honor such advance notes, the Consul was acting in accordance with Section 237 of the Consular Regulations of the United States. When the bark arrived at New York, the libelants were paid the wages earned less the amounts advanced. They then sought to recover the sum thus deducted, by virtue of the terms of the act above referred to, on the theory that such advances were unlawful and of no effect. The difference between the case thus presented and that in *Sandberg* v. *McDonald*, was that in the former the advances were made by the master of an American vessel in a South American port, whereas in the latter case, the advances were made to

foreign seamen in a British port. Mr. Justice DAY, speaking for a majority of the Court, said (p. 213):

> "That American vessels might be controlled by congressional legislation as to contracts made in foreign ports may, for present purposes at least, be conceded. It appears that only by compliance with the local custom of obtaining seamen through agents can American vessels obtain seamen in South American ports. This is greatly to be deplored, and the custom is one which works much hardship to a worthy class. But we are unable to discover that in passing this statute Congress intended to place American shipping at the great disadvantage of this inability to obtain seamen when compared with the vessels of other nations which are manned by complying with local usage."

Again, four of the Justices dissented, saying (p. 215):

> "We regard the act of Congress as clear and that the theatre of its injunction is the harbors of the United States. It is misleading to dwell upon the jurisdiction of other places, which is but another name for control. The jurisdiction, control, is in and by the United States and the command is that advances shall not be deducted from wages of seamen on vessels, American or foreign, while in the waters of the United States. Where they were made or under what circumstances made are not factors in judgment. They are the mere accidents of the situation and if they reach the importance and have the embarrassment depicted by counsel, the appeal must be to Congress, which no doubt will promptly correct the improvidence, if it be such, of its legislation."

Again the majority of the Court held to a construction which avoided interference with the foreign ship beyond the point clearly indicated by Congress.

So it uniformly has been held that the acts prohibiting the bringing of Chinese laborers to the United States are not violated by a foreign vessel coming into one of

our ports with Chinese as seamen or members of the crew.

In Re Moncan, 14 Fed., 44 (Cir. Ct., D. Oregon 1882);
United States v. *Ah Fook*, 183 Fed., 33 (C. C. A., 9th Circ., 1910);
United States v. *Burke*, 99 Fed., 895, 898 (Cir. Ct. S. D. Ala., 1899);
United States v. *Jamieson*, 185 Fed., 165 (Circ. Ct., S. D. N. Y., 1911); appeal dismissed, 223 U. S. 744 (1912).

In *Taylor* v. *United States*, 207 U. S., 120 (1907), the Court construed a statute which made it the duty of the owners of a vessel bringing an alien to the United States under penalties to prevent the landing at a place other than designated by the immigration officers. An Austrian, a sailor on a Cunard steamship, went ashore at New York on leave and failed to return. It was sought to hold the Company liable under this statute. But this Court held, speaking by HOLMES, J., at page 125, that the words "bringing to the United States" in the statute, plainly mean, "transporting with intent to leave in the United States and for the sake of transport—not transporting with intent to carry back, and merely as incident to employment on the instrument of transport," and that the requirement as to landing did not apply to the ordinary shore leave of sailors of the crew.

In *Scharrenberg* v. *Dollar Steamship Company, et al.* 245 U. S. 122 (1917), the Court held that inducing and assisting aliens to come from abroad working as seamen on the way for bona fide service as seamen on an American ship during her voyage from American ports to foreign countries and while she lies in such ports preparatory to or in the course of such voyage, is not an assisting or encouraging of the importation or immigration of alien

"contract laborers" "into the United States" within the meaning of Sections 4 and 5 of the Act of February 20, 1907 (34 Stat. 898, as amended in 36 Stat. 263). The Court further held that an American ship engaged in foreign commerce is not a part of the territory of the United States, in the sense that seamen employed upon her while in American ports or on voyages, can be said to be performing labor in this country within the meaning of the statutory provisions above referred to. Mr. Justice CLARKE referred to the definition of "contract laborers" contained in the Act, viz. (p. 125):

> "Persons * * * who have been induced or solicited to migrate to this country by offers or promises of employment or in consequence of agreements, oral, written or printed, express or implied, to perform labor in this country of any kind, skilled or unskilled."
>
> "In familiar speech" the court said (p. 126), "a 'seaman' may be called a 'sailor' or a 'mariner,' but he is never called a 'laborer,' although he doubtless performs labor when assisting in the care and management of his ship; and a 'seaman' is defined in the United States statutes applicable to 'merchant seamen' as being any person (masters and apprentices excepted) who shall be employed to serve in any capacity on board a vessel, Rev. Stats., Sec. 4612. In the shipping articles which the United States law requires shall be signed by members of the crews of ships of American registry engaged in foreign commerce, the men are designated as 'seamen' or 'mariners.' Thus neither in popular nor in technical legal language would the men employed on the Mackinaw be called or classed as 'laborers,' and such seamen are not brought 'into this country' to enter into competition with the labor of its inhabitants, but they come to our shores only to sail away again in foreign commerce on the ship which brings them, or on another as soon as employment can be obtained. * * * This construction of the Act also has long been applied by the Department of Labor in its practical administration of the law."

These decisions illustrate the extreme care which this court has exercised to so limit the application of acts of Congress that they shall not interfere with the internal affairs of visiting foreign merchant ships, except and to the extent of, an inescapable Constitutional or congressional mandate giving them such effect.

The executive departments also always have exercised like care in avoiding such interpretative application of statutes as unnecessarily to interfere with international commercial relations. An example of this is furnished by the construction put by the Department of Justice upon the statute against the importation of opium. Section 1 of the act on this subject (35 Stat. 614; 38 Stat. 275, 276) made it unlawful "to import into the United States" opium, but contained a proviso permitting the importation of opium other than smoking opium for medicinal purposes only.

Section 2 imposed a penalty upon any person who should

> "fraudulently or knowingly import or bring into the United States"

any opium contrary to law.

Section 4 provided that any person subject to the jurisdiction of the United States who should receive or

> "have in his possession, or conceal on board of or transport on any foreign or domestic vessel * * * destined to or bound from the United States or any possession thereof, any smoking opium * * * "

should be subject to a penalty.

In 27 Op. Attys. Gen., 440, the Attorney General, in construing these sections, held that the bringing of smoking opium into a port of the United States on one vessel for immediate carriage abroad by another vessel was not legally an importation, and that such transshipment could lawfully be made. The correctness of this opinion was not

questioned, but Congress thereupon amended the law by expressly enacting, not only that no smoking opium should be admitted into the United States "or into any territory under the control or jurisdiction thereof for transportation to another country," but that no opium should "be transferred or transshipped from one vessel to another vessel within any waters of the United States for immediate exportation or any other purpose." Here the intention of Congress was clearly expressed in language which is in marked contrast with the provisions of the National Prohibition Law, and which illustrates how clearly the Congressional will is expressed where it intends to apply a domestic regulation to foreign merchant ships in American ports. But the care which Congress there used to exclude this article from our territorial waters serves also to point out the underlying distinction between the situation there existing and the facts of the instant case. Section 5 of the Opium Act dealt only with *smoking opium*, which had no legitimate uses and which for years had been considered an international outlaw, the mere presence of which within their borders was considered intolerable by all civilized nations. Here, on the other hand, it appears from an examination of the National Prohibition Act that Congress has permitted the possession and use of intoxicating beverages in the homes of our people acquired prior to the effective date thereof. The Act also repeatedly recognizes as legal the existence of large quantities of bonded liquor within the United States, as also the manufacture, sale and transportation of intoxicating liquor for other than beverage purposes (Section 3 and Section 37 of Title II). It cannot, therefore, be said that the National Prohibition Act imposes an *unqualified prohibition*, still less can it be said that Congress intended to prevent the mere presence within our borders of intoxicating beverages under any and all circumstances for the Act itself proves

a contrary intention. Congress has not only failed to use language sufficient to indicate that liquor could not be possessed within our borders for any purpose, but under the system of qualified prohibition imposed by the Act there was no reason why it should prohibit the presence of such liquor within our territorial waters as an incidental element to the continuation of international commerce sanctioned by the usage and custom of civilized nations since the inception of our Government. In marked contrast with this also is the record of congressional action respecting the subject under consideration in the cases at bar. From the date of the enactment of the National Prohibition Act, foreign ships had been bringing into American waters and ports liquors as a part of the ships' stores, for consumption by passengers and crew on the high seas with the approval and subject to regulations promulgated by the Treasury Department, in conformity with international usage and the uniform course of American law and regulation from the foundation of the Government. This was a matter of newspaper notoriety and general knowledge. Treasury decisions had been promulgated which sanctioned the practice, and the Attorney General of the United States had declared its legality and laid down the rules under which it should be conducted. And yet, in the legislation of 1921, by which Congress sought to strengthen the law in other directions and to clothe the courts of the Territory of Hawaii and the Virgin Islands with jurisdiction to enforce the Act no mention was made of this subject and no attempt to broaden the scope of the law, so as to apply it to foreign vessels in American ports. It seems incredible that if Congress had intended to apply prohibition to foreign merchant ships, it would not have expressed such intention in the amending act. The fact that it did not, furnishes strong evidence that it had no intention of interfering with the well established usages of international

commerce. This moreover is emphasized by the fact that Section 5 of the amending act expressly dealt with the application of prohibition to common carriers by land and sea. This section in part provided as follows:

> "If distilled spirits * * * are lost * * * while in possession of a common carrier subject to the Transportation Act of 1920 or the Merchant Marine Act of 1920, or if lost by theft from a distillery or other bonded warehouse, and it shall be made to appear to the commissioner that such losses did not occur as the result of negligence * * * no tax shall be assessed or collected upon the distilled spirits so lost * * *" (42 Stat. 223).

It is important to note in this connection that the provisions of the Transportation Act of 1920 are expressly applicable to foreign merchant vessels; and yet, neither the framers of the act, nor those who discussed it on the floors of Congress, suggested that the amending act should be broadened so as to make it clear that the possession by a foreign common carrier by vessel within American waters of intoxicating liquors for beverage purposes, was prohibited by our laws. That they did not is strong evidence that they had no intention of extending prohibition to those limits.

When Congress legislated with respect to intoxicating liquors in the territory of Alaska, by Act approved February 14, 1917, (39 Stat. 903), it clearly expressed its intention to apply prohibition to vessels within the territorial waters by the following language in Section 29 of the Act:

> "Sec. 29. That any person, company, or corporation who shall import or carry liquors into or upon the territorial waters of Alaska in or upon any steamship, steamboat, vessel, boat or other watercraft, or shall permit the same to be so imported or carried into or upon said waters, * * *"

shall be subject to the penalty.

This act again illustrates the care which Congress always has exercised to make it clear whenever it intended that its enactment should have a *quasi* extra-territorial application.

So in dealing with the Canal Zone, Congress, unrestricted by the limitations of the Constitution or the Eighteenth Amendment but legislating as a domestic legislature, enacted in Section 20, Title III, of the National Prohibition Law the following:

> "That it shall be unlawful to import or introduce into the Canal Zone, or to manufacture, sell, give away, dispose of, transport, or have in one's possession or under one's control within the Canal Zone, any alcoholic, fermented, brewed, distilled, vinous, malt, or spirituous liquors, except for sacramental, scientific, pharmaceutical, industrial, or medicinal purposes, under regulations to be made by the President, and any such liquors within the Canal Zone in violation hereof shall be forfeited to the United States and seized: * * * ." (41 Stat. 305, 322).

It will be noted that this prohibition went far beyond the Amendment or the National Prohibition Act. It not only prohibited the importation but the *introduction* into the Canal Zone. It absolutely prohibited *possession* by an individual or his having under his control any of the described beverages. Then, in order to emphasize its intention that these extreme measures should not be extended so as to interfere with foreign commercial intercourse, it added the following proviso:

> "*Provided,* That this *section* shall not apply to liquor in transit through the Panama Canal or on the Panama Railroad." (Italics ours.)

Mr. Justice Holmes, in dealing with this section in the *Grogan Case, supra,* referred to the fact that the Eighteenth Amendment meant a great revolution in the policy of this country, and said (p. 424):

> "The manufacture, possession, sale and transportation of spirits and wine for other than beverage purposes are provided for in the act, but there is no provision for transshipment or carriage across the country from without. When Congress was ready to permit such a transit for special reasons, in the Canal Zone, it permitted it in express words."

The learned Justice, it seems to us, overlooked the fact that the provisions affecting the Canal Zone in the National Prohibition Act are not included in the general provisions relating to the United States, but in a specific section incorporated in the act to deal with that place. Section 20, Title III, places the Canal Zone in a special position. For, as we have pointed out, it subjects its inhabitants to greater prohibition than those enacted with respect of the United States in general in other portions of the act. It will be noted that Congress has not said in the proviso that the *act* shall not apply to liquor in transit through the Panama Canal or on the Panama Railroad, but that "this *section*" shall not apply. In other words, as the language of the section goes far beyond the confines of the Amendment and the Act, Congress deemed it necessary to disclaim the application of its provisions, that is, the provisions of the *section*, to commerce passing through the Zone. And, therefore, it cannot be that by referring in Section 20 to the carriage on the Panama Canal and on the Panama Railroad, Congress intended that no other transportation of liquor anywhere within the United States, or its possessions, was authorized except through the Canal Zone. The proviso completes the legislation by Congress respecting the Zone, but it has no bearing on the interpretation of the Act itself in its application to the United States. It does illustrate the care which Congress has taken in this act, as in so many others, to avoid the implication of legislation affecting foreign merchant vessels, save and except in the particulars where its deliberate and expressed policy was to apply legislation to those ships.

IV.

Sea Stores on merchant ships are considered as part of the ship itself and always have been exempted from tariff and other laws affecting merchandise introduced into the country.

> "'Sea Stores,' in our tariff legislation, are the stores contained in incoming vessels which are necessary for their use for the purposes of the voyage. These stores are plainly enough merchandise when purchased, and they are so treated by the statutes (Rev. Stat., sec. 3111) until put aboard ship. They then become, practically speaking, part of the equipment of the ship, which equipment, like the ship itself, is exempt from duty, because, though personal property, it is not regarded as an import (*The Conqueror*, 49 Fed. Rep., 99, 103, 105). This seems to have been assumed from the very beginning of our Government, it being taken for granted that sea stores were exempt from duty even before they were expressly made exempt. The name was always restricted to articles which, brought into port aboard ship, were to be consumed aboard or carried off again on the outward voyage; or, if put ashore at all, landed only for the convenience of the ship itself. (See act of Aug. 4, 1790, chap. 35, sec. 22; act of Mar. 2, 1799, chap. 22, sec. 45; Rev. Stat., secs. 2795, 2796, 2797.) Articles do not become 'sea stores' until they have thus become part of the ship's equipment" (21 Op. Attys.-Gen. 92, 94 [OLNEY]).

The Act of March 2, 1799, amended May 1, 1872, and then codified into Section 2775, Revised Statutes, requires a special report of spirits and wines on board vessels coming into our ports, carried as sea stores. The master is required on arrival to specify his sea stores in order that the precise nature and extent of such pro-

visions may be known, and their immunities established. Under the general requirements as to the manifest which must be made by masters of foreign vessels coming to United States ports, there is provision requiring "an account of the sea stores remaining, if any" (R. S., 2807, as amended by Act of June 3, 1892, 27 Stat. 41).

The question of sea stores and their relation to the manifest under the above-mentioned statutes was discussed by Mr. Justice BALDWIN, sitting on Circuit, in the case of *United States* v. *Twenty-four Coils of Cordage*, Fed. Cas. No. 16,566; Baldwin, 502 (Cir. Ct., E. D. Penn., 1832).

Mr. Justice BALDWIN said on page 279:

> "It directs a manifest of the cargo to be made out, 'together with the name or names of the passengers, distinguishing whether cabin or steerage passengers, or both; their baggage and packages belonging to each, together with an account of the remaining sea stores, if any.' To the question, what are such sea stores? a plain answer is furnished; such articles of provision and stores, as were put on board by the captain or passengers, and not consumed on the voyage, but remaining on hand at its termination. The words 'vessel and cabin stores,' in the form of the manifest, are not inserted for the purpose of introducing any distinct class or kind of sea stores, but merely as the head, under which those designated in the preceding part of the section should be entered on the manifest, as the 'remaining sea stores.' These views of the law are very fully apparent in the thirtieth section, prescribing the form and requisites of the oath of the master to the manifest. 'And I do further swear, that the several articles specified in the said manifest, as the sea stores for the cabin and vessel, are truly such, and were bona fide put on board for the use of the officers, crew and passengers thereof; and are intended to remain on board, for the consumption of said officers and crew.' If the ship has on board wines, spirits or teas, the captain is, by the same section, required to report the quantity and kind on board,

> as sea stores, to enter them in the manifest under that head, and to superadd his oath, as in the case of other sea stores on board."

In the case of *United States* v. *One Hempen Cable and One Hempen Hawser,* Fed. Cas. No. 15,931a, 41 Niles' Reg. 273 (1831), Judge DAVIS, in the District of Massachusetts, in construing the Customs Laws, spoke of sea stores as follows, at page 265:

> "'Vessel and cabin stores', is the expression in the 23d section of the collection law; in the 45th section, it is, 'sea stores of a ship or vessel.' These expressions are understood to mean, and naturally do mean the stores or provisions laid in for cabin or steerage, for officers, passengers or crews, or if further extended, can only be applicable to articles of consumption, perishing in the using, and not to the tackle and apparel of the ship, the sails, rigging, cables or anchors. These are to be considered as attached to the ship, and so belonging to the ship that it is no more necessary to include them in the manifest than the ship itself."

See also,

The Satellite, 188 Fed., 717 (D. C., D. Mass. 1910);

The Penn, 273 Fed., 990 (C. C. A. Third Circuit 1921).

Sea stores are considered as part of the ship—its furniture or appurtenances, within the meaning of policies of marine insurance and under statutes affecting the liability of ship owners.

In *Pelley* v. *The Royal Exchange Assurance Company,* 1 Burr, 341, Lord Mansfield held that the destruction of a ship's sea stores, while temporarily on land, was to be considered in the same light as if the accident had happened on board the ship, and a recovery might be allowed under a policy of insurance upon the "furniture" of the vessel.

The plaintiffs obtained a verdict on an order to show cause why a new trial should not be granted.

In *Brough* v. *Whitmore*, 4 Term Rep. 206, Lord Kenyon, Ch. T., speaking for the unanimous Court, said at page 208:

> "On the trial of this cause I had nothing to guide my judgment on the construction of this instrument but the words of the policy; and when it was stated that 'provisions' were included in the word 'furniture,' I confess I was somewhat at a loss to know to what extent the underwriters were liable on words so indefinite as these which are used. But then I thought, and still continue to think, that the rule of law is to be given (not by merchants) but by the Court; though, when a question arises on the construction of the words of an instrument, which are in themselves ambiguous, it is a matter fairly within the province of those who alone act upon such instruments to declare the meaning of them; and I remember it was said many years ago that, if Lombard Street had not given a construction to policies of insurance, a declaration on a policy would have been bad on a general demurrer; but that the uniform practice of merchants and underwriters had rendered them intelligible.
>
> The question here arises on the meaning of the word 'furniture.' One of the jurymen said, and in that he is now confirmed, that, according to the understandings of those who enter into these contracts, *it includes the provisions for the use of the crew*. Now, among the several accidents, against which the defendant insured, are perils by fire; and this ship being at Canton, it became necessary to refit her, and to take out all her goods, and land them on this island, where the accident happened; by which these provisions, with the rest of the goods, were burned; and there is no doubt but that the loss on this island must be considered in the same light as if it had happened on board the ship itself. This was determined in *Pelley* v. *The Royal Assurance Company* (1 Burr, 341). Then if these provisions be insured as part of the

outfit of the ship, and they were consumed by one of the perils insured against, there is an end of the question; a loss has happened within the meaning of the policy; and consequently the defendant is liable. But it was said in the argument that the instant any of the provisions were consumed on board there could not be a total loss; but the short answer to that is, that that comes within the wear and tear of the ship, and it might as well be said that if a mast were a little injured, there could not be a total loss. If this decision were to militate against any determination, or even an *arbiter dictum*, of *Lord Mansfield*, I should have hesitated for some time before I delivered my opinion. But the case of *Robertson* v. *Ewer* is clearly distinguishable from the present; here the goods were consumed by an accident by fire on board the ship (for the island was for this purpose equivalent to the ship) and within the meaning of the policy of insurance; but in that case they were consumed by the negroes during a detention of the ship."

As a result the rule was discharged.

In the case of *The Dundee* 1 Hagg. Adm., 109, Lord Stowell decided that the *fishing stores* of a vessel engaged in The Greenland fisheries were *appurtenances* of the ship within the meaning of 53 Geo., 3, c. 159, restricting the liability of ship owners in cases of loss to the value of the ship, freight, etc. "The word appurtenances," said he, "is a word of wider extent than *furniture*, and may be properly applied to many things that could not be so described (with propriety, at least) in a contract of insurance. It may not be a simple matter to define what is, and what is not, an appurtenance of a ship. There are some things that are universally so, things must be appurtenant to every ship, *qua* ship, be its occupation what it may. But I think it is rather gratuitously assumed that particular things may not become so, from their immediate and indispensable connection with a ship, in the particular occupation to which

she is destined, and in which she is engaged. A ship may have a particular employment assigned to her which may give a specialty to the apparatus that is necessary for that employment. * * * The word 'appurtenances' must not be construed with a mere reference to the abstract, naked idea of a ship; for that which would be an incumbrance to a ship one way employed, would be an indispensable equipment in another, and it would be a preposterous abuse to consider them alike in such different positions. You must look to the relation they bear to the actual service of the vessel."

This decision was affirmed in the Court of King's Bench, *Gale* v. *Laurie*, 5 B. & C., 156, where it came up on a declaration in prohibition. ABBOTT, *C. J.*, however, makes a distinction between the use of the word in the statute and in contracts of insurance, which renders it doubtful whether such stores would pass under a bill of sale of a ship, etc., and leaves it to be determined by usage. "We think,' he says (p. 164), "that whatever is on board a ship for the object of the voyage and adventure on which she is engaged, belonging to the owners, constitutes a part of the ship and her appurtenances within the meaning of this act, whether the object be warfare, the conveyance of passengers or goods, or the fishery. This construction furnishes a plain and intelligible general rule; whereas, if it should be held that nothing is to be considered as part of the ship that is not necessary for her navigation or motion on the water, a door would be opened to many nice questions, and much discussion and cavil. It is true, that in the case of insurance these stores are not considered as covered by an ordinary policy on the ship. But insurance is a matter of contract, and the construction of the contract depends in many cases upon usage. And the construction of a policy can furnish no rule for the construction of this act of parliament, which was passed for purposes of a different nature."

In the English Marine Insurance Act of 1906, which is a codification of the maritime practice on the matter of marine insurance, the insurable value of the ship is thus stated in Section 16 of the Act, which can be found as an appendix A at page 1659, Volume II, of the Tenth Edition of Arnould on Marine Insurance.

Section 16 reads as follows:

* * * * * *

"(1) In insurance on ship, the insurable value is the value, at the commencement of the risk, of the ship, including her outfit, provisions and stores for the officers and crew, money advanced for seamen's wages and other disbursements (if any) incurred to make the ship fit for the voyage or adventure contemplated by the policy, thus the charges of insurance upon the whole.

The insurable value, in the case of a steamship, includes also the machinery, boilers, and coals and engine stores if owned by the assured, and, in the case of a ship engaged in a special trade, the ordinary fittings requisite for that trade."

* * * * * *

Arnould on Marine Insurance (Tenth Edition), Vol. 1, at page 295, Section 219, also deals with the question of the insurance on ships as embodied in Schedule 1 of the Marine Insurance Act above referred to:

"Schedule 1 of the Marine Insurance Act, 1906, contains Rules for the construction of policies in the ordinary form, which apply where the context does not otherwise require. No. 15 of these Rules provides that 'the term "ship" includes the hull, materials and outfit, stores and provisions for the officers and crew, and, in the case of vessels engaged in a special trade, the ordinary fittings requisite for the trade, and also, in the case of a steamship, the machinery, boilers, and coals and engine stores, if owned by the assured.'"

"(The clause 'and also upon the body, tackle, etc., in this policy made it unnecessary before the

Act to decide whether fittings or stores were covered by the word 'ship.' Thus it was held that the provisions put on board the ship, when she sails, for the use of the crew on the voyage, are comprehended under the word 'furniture,' and protected by an insurance on the 'body, tackle, apparel, ordnance, furniture,' etc., of the ship in the common printed form. The contrary position had been erroneously inferred from the case of *Robertson* v. *Ewer*, which decided no such point, but merely established that the underwriter on ship could not be liable for the consumption of such provisions while the ship was detained by an embargo.

"It was admitted, in *Brough* v. *Whitmore*, that all the ship's stores and tackle were also included in the insurance on ship in the common form.

"The word 'outfit' is sometimes used to denote the necessary stores and provisions put on board the ship for the use of the crew on the voyage; and, in this sense, outfit is included in a general insurance on ship. It is in this sense that Lord Ellenborough uses the word when he says that hull and outfit are both protected by an insurance on ship. (*Hill* v. *Patten* [1807], 8 East, 373, 375; *Forbes* v. *Aspinall* [1811], 13 East, 323, 325.)"

A further proof of the incorporation of stores into the ship is the fact that they are valued by surveyors when valuing the ship for general average contribution as part of the contributory value of the ship.

In Lowndes on General Average, which is perhaps the best known of all books on General Average, the following rule is laid down in Section 76:

"The ship, the cargo, and the freight, constitute, generally speaking, the whole of the property on shipboard liable to contribute to general average. Should there be any kind of property, not coming under any of these heads, which is preserved from destruction by a general average act, this likewise must contribute, unless these be some special reason for exempting it. The lives which are pre-

served are not brought into account; by reason, it has been said, of the impossibility of assessing them at a pecuniary value. The mariners are not required to contribute in respect of their wages; the reason given being, that they are supposed to have done their share towards the ship's preservation by their personal efforts. The luggage and personal effects of passengers and crew do not contribute; the former, apparently for no other reason than the comparative insignificance of their value. These are the only exemptions. Everything which is covered by an ordinary policy of insurance on the ship, that is to say, her appurtenances of every kind, including the provisions laid in for the voyage and unconsumed at the end of it, is brought into contribution as included in the value of the ship. If there be anything else on shipboard, not constituting merchandise in the proper sense of the word, yet possessing a substantial value, it ought to contribute. For example, the unconsumed stores of a troop ship, or those laid in by a passenger charterer; planks or other materials used as dunnage, or covering-boards, or for the construction of temporary bulkheads for cargo, or the like, should properly be brought in as contributing. It is only the small value of such articles which occasions their being, in practice, frequently disregarded."

It is also a very interesting fact that in the case of many European nations a separate list of ship's stores is considered as part of the ship's papers in addition to the ordinary cargo manifest. In this connection see Atherly Jones on *Commerce in War*, pages 347 to 352.

It was held in *United States* v. *Hawley & Letzerich*, 160 Fed., 734 (Cir. Ct., S. D. Tex., 1908), that coal was not sea stores and the following definition of sea stores was given by Judge BURNS, in reviewing a decision of the Board of General Appraisers, at page 739:

"The sole question for review as disclosed by the pleadings and relied upon in the argument is

whether or not 'coal' is a part of the sea stores of the vessel. 'Sea stores' are defined in Commercial Navigation as 'the supplies of different articles provided for the subsistence and accommodation of the ship's crew and passengers.'

"It follows, therefore, that coal being no part of the vessel's sea stores, the petition for review should be sustained, the decision of the Board reversed, and the action of the Collector of Customs in all things affirmed."

As set forth in the Bills of Complaint *(supra)*, the laws of Italy, France and Holland, require merchant ships trading with their ports to carry and furnish liquors for the consumption of passengers and crew. In those cases, liquors are *necessaries* within the meaning of the Admiralty Law. See *The Satellite (supra)*.

It was, therefore, in pursuance of a long applied doctrine of sea law and the consistent legislative policy that, after the adoption of the Eighteenth Amendment and the passage of the National Prohibition Act, the Treasury Department promulgated regulations covering sea stores of liquors which have been in force up to the present time. The consistent policy maintained until the enactment of the National Prohibition Act, and after its enactment, under approval of the Treasury Department and the Attorney General, was in conformity with the uniform policy of the United States from the foundation of the government. The question raised by the opinion of Attorney General Daugherty and the decision of the District Court in the present cases, presents to this Court the question of whether or not the necessary construction of the Prohibition Law overrules this consistent uniform continued policy of our government, and, disregarding all international comity, imposes our domestic regulations upon all foreign vessels coming into our ports.

V.

Even if the foreign steamships within American ports or waters should be considered as territory subject to the jurisdiction of the United States, nevertheless the carriage of intoxicating liquors as part of their Sea Stores under the circumstances described in the bill is not a violation of the Amendment or the Statute.

Two specific questions of construction arise with respect to the application of the Amendment and the Act to sea stores on foreign vessels within American waters: (1) Does it involve the *transportation* of liquors within the United States? (2) Is the mere *possession* a violation?

The Eighteenth Amendment prohibits the

manufacture sale transportation	}	within
importation		into
exportation		from

the United States and all territories subject to the jurisdiction thereof, of intoxicating liquors for beverage purposes.

The National Prohibition Act by Section 3 of Title II, extends this prohibition to *possession* "except as authorized by" the act.

And by Section 33 of Title II, the *possession* of liquors by any person not legally permitted under the statute to possess liquor is made

> "*prima facie* evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished or otherwise disposed of in violation of the provisions of this title" (41 Stat., 305, 317).

It is well settled law, that the carriage of ship stores on board a foreign vessel coming into ports of the United States and on its departure therefrom is neither *importation* into nor *exportation* from the United States. Indeed, it was conceded by the United States Attorney in the District Court that "the Government does not contend and will not that these ships either export or import the liquors * * * that is, within the meaning of the law and statute."

In *Swan & Finch Co.* v. *United States*, 190 U. S., 143 (1903), it was held that goods placed on board a vessel bound for a foreign port to be used on board the vessel during its voyage, and in fact so used and consumed, were not exported within the meaning of the statute allowing, under certain circumstances, a draw-back on the exportation of imported articles on which duties have been paid. The Court said, per BREWER, J. (p. 144):

> "Whatever primary meaning may be indicated by its derivation, the word 'export' as used in the Constitution and laws of the United States, generally means the transportation of goods from this to a foreign country. 'As the legal notion of emigrating is a going abroad with an intention of not returning, so that of exportation is a severance of goods from the mass of things belonging to this country with an intention of uniting them to the mass of things belonging to some foreign country or other.' 17 Op. Attys. Gen., 583. * * * It cannot mean simply a carrying out of the country, for no one would speak of goods shipped by water from San Francisco to San Diego as 'exported,' although in the voyage they are carried out of the country. Nor would the mere fact that there was no purpose of return justify the use of the word 'export.' Coal placed on a steamer in San Francisco to be consumed in propelling that steamer to San Diego would never be so designated. Another country or state as the intended destination of the goods is essential to the idea of exportation."

In the same way, it must be that the legal notion of importation is a severance of goods from the mass of things belonging to another country and the bringing of them into this country, with the intention of uniting them to the mass of things belonging to this country.

See

The Conqueror, 49 Fed., 99, 102 (D. C., S. D. N. Y., 1892); affirmed, 166 U. S., 110 (1897).

> "To 'import' is to bear or carry into. An 'imported article' is an article brought or carried into this country from abroad. * * * A vessel arriving in the ordinary course of navigation is no more 'imported', in the ordinary sense of that word, than she is 'transported.'"

The goods are neither manufactured within the United States, nor intended to be sold therein, and, therefore, the next question under the amendment is whether or not they are *transported* within the United States for *beverage* purposes.

That the carriage of liquors from one point to another within the United States may not amount to *transportation* within the prohibition of the amendment and the statute, is recognized in the case of *Street* v. *Lincoln Safe Deposit Co.*, 254 U. S., 88 (1920). When the amendment took effect, Street owned certain intoxicating liquor which was stored in a warehouse in a room under his exclusive custody and control. He sought to remove it from that place to his own residence. This, it was held, it was entitled to do. The transportation which was necessary in order that the liquor might be taken from the one place to the other was declared to be legal by virtue of the fact that lawful ownership, possession and control of the liquor on the part of the individual transporting the same, existed at the commencement and at the termination of such transportation. The very basis of the decision is found in the fact that Street did lawfully possess, control and have ac-

cess to the liquor both at the place from which and the place to which the transportation was effected. In this connection, Mr. Justice CLARKE said (p. 93):

> "That transportation of the liquors to the home of appellant, under the admitted circumstances, is not such as is prohibited by the section is too apparent to justify detailed consideration of the many provisions of the act inconsistent with a construction which would render such removal unlawful, and that the act is understood by the officers charged with its execution as permitting such transportation is shown by the provision of the regulations of the Bureau of Internal Revenue authorizing permits for the transportation of liquors from one permanent residence of an owner to another in case of his removal, although no such transfer is in terms provided for by the act."

In commenting upon the applicability of this decision to the case at bar, Judge HAND said (Rec. No. 659, p. 24):

> "The case of *Street* v. *Lincoln Safe Deposit Company*, 254 U. S., 88, did not decide anything to the contrary; it turned upon the fact that possession of the liquor in the leased room and in the house were both lawful, and that the *movement* from one to the other could not be unlawful. To apply it to the cases at bar is to beg the question, because the lawfulness of the possession here depends upon whether this is transportation under the statute. *The steamers have no express warrant of law, as Street had, for the possession of liquor.*" (Italics ours).

But in the *Street* case the Court did not hold that the individual might lawfully own, possess and control a quantity of intoxicating liquor for an indefinite period at any point along the line of transit from the storeroom to the private residence. The Court expressly admitted that "no such transfer is in terms provided for by the act" (p. 93). No express statutory authority is given to

any individual by the National Prohibition Act to own, possess, control or have access to intoxicating liquors during the period of transit within the territorial limits of the United States between points at which such ownership, control, etc., is made lawful. Street had no "express warrant of law" (in the words of Judge HAND's decision) either to transport or possess liquor on the streets of New York City during the transit of the same from the storeroom to his private residence. With due respect, it would seem that Judge HAND begs the question, when he says: "* * * the lawfulness of the possession here depends upon whether this is transportation under the statute." So far as the actual period of transportation is concerned, Street had no more express statutory right to ownership, possession, control and access to intoxicating liquors during such transportation than have the steamship lines within our territorial waters under the facts and circumstances of this case. The distinction is found in the source from which is derived the legality of the respective ownership, use, possession, control and access to intoxicating liquor at the points from which and to which the "transportation" is effected. In the case of the steamship lines, the transportation begins from a foreign port, where their ownership, use, possession and access to liquors is lawful. Some of the liquors are consumed by the passengers and the crew on the high seas. They are not destined to a point within the United States. None of them is transported "for beverage purposes" within the United States, or territory subject to its jurisdiction. The possession which is lawful in the steamship when it crosses the three-mile limit, marking the territorial waters of the United States, continues to be lawful throughout the duration of its presence within such waters.

In *United States* v. *Two Hundred and Fifty-Four Bottles of Intoxicating Liquor*, 281 Fed., 247 (1922), a libel of information was filed on behalf of the Govern-

ment to forfeit certain liquors brought into the port of Galveston on a vessel owned by and operated for the account of the United States Shipping Board Emergency Fleet Corporation. The master of the vessel filed a claim for the liquor, asserting that he had the legal right to possess liquor aboard his vessel outside of the three-mile limit, and that, by manifesting the said liquor as "ship's stores," he had relieved himself of the operation of the National Prohibition Act while in the harbor.

HUTCHINSON, D. J., said:

> "If the possession of the liquors by the captain was unlawful prior to his entering the harbor, then clearly the manifest of them cannot relieve the illegality; while, if that possession was lawful, I think it equally clear that though goods not capable of importation are not required to be manifested under Section 2809, Revised Statutes being Comp. St. §5506 (see opinion this day filed in *United States* v. *Thirty-Six Cases of Intoxicating Liquor, etc.*, 281 Fed., 243), the captain could have reported these liquors under Rev. Stat. §2774 (Comp. St. §5470) and saved their forfeiture.
>
> "This being so, I am not impressed with the argument of the government that the manifesting of the liquors as 'ship's stores,' even though they were not such, would convert a lawful into an unlawful possession, since the manifest of articles lawfully held on the high seas, but not capable of importation into the United States, has but one purpose, that of disclosure or surrender to the custody of the customs officers of the articles while in port. Such purpose is effectually served by the report or manifest of the articles no matter under what name or in what way reported.
>
> "In what is said it is not meant to at all discuss the effect of a manifest of excessive sea stores, as these are controlled by different statutes, and the libel in this case does not present that question for review. *It is merely meant to hold that, from the standpoint of the prohibition laws, a legal possession on the high seas remains*

> *a legal possession in the port, if the liquors, during the time the ship is in port, are properly reported and surrendered to the customs officers for sealing and custody.*" (Italics ours.)

The Amendment does not make mere possession of intoxicating liquors unlawful. Its prohibition applies only when one lawfully in possession when the Amendment took effect seeks to sell or transport it within the United States, etc., or to export it therefrom, for beverage purposes. If the National Prohibition Act goes beyond this, it exceeds the authority conferred upon Congress by the Amendment. We do not construe it as going beyond the Amendment. The Act, recognizing the lawfulness of possession of liquors in a private dwelling, makes possession elsewhere only *prima facie* evidence that it is possessed for an unlawful purpose, and this evidence, of course, is open to rebuttal by the facts of the case.

In the case of *Corneli* v. *Moore,* 257 U. S., 491 (decided January 30, 1922), permission to remove liquor by Corneli from a bonded warehouse in which he had stored them prior to the enactment of the Prohibition Act, to a private home, was refused, on the ground that he did not have lawful "control, access to or possession" of the spirits in such warehouse, and that the "transportation" would necessarily precede arrival of the liquors at a place where the same might be lawfully "owned, possessed," etc.

Mr. Justice McKenna, in delivering the opinion of the Court, distinguished the case from the decision in the *Street* case (254 U. S., 88), saying (p. 497):

> "There is no analogy in Street's relation to the room in the Deposit Company's warehouse and appellant's relation to the bonded warehouses. They (the appellants) had neither control, access to or possession of the spirits they purchased. Mere ownership was not the equivalent. Under Section

> 33, there must be ownership and possession in one's private dwelling, and that character cannot be assigned to bonded warehouses of the government."

The actual basis of this decision is stated by Mr. Justice HOLMES in the *Grogan* case (42 Sup. Ct. Rep., 423, 424), as follows:

> "*Street* v. *Lincoln Safe Deposit Co.*, 254 U. S., 88, * * * was decided on the ground that the liquors were in the strictest sense in the possession of the owner * * *, and that to move them from the warehouse to the dwelling was no more transportation in the sense of the statute than to take them from the cellar to the dining room; whereas in *Corneli* v. *Moore* * * * they were not in the owner's possession and required delivery and transportation to become so."

In the cases at bar, the liquors are in the strictest sense in the lawful possession of the owners of the steamships, and they remain immovable within the ship as a part of its sea stores, in effect as a part of the ship, in the same sense in which a cable which had been bought in Liverpool by the master of an American vessel to replace an old one worn out was held to be a part of the ship and not to be treated as imported goods, wares or merchandise, in the case of *U. S.* v. *A Chain Cable*, 2 Sumner, 362, Fed. Cas. 14,776 (Cir. Ct., D. Mass., 1836), cited in the case of *The Conqueror (supra)*.

The movement of these liquors within our territorial waters moreover can in no proper sense be deemed a "transportation" in any accepted sense of the word. The universal and practical conception of transportation as applied to any article or commodity under any circumstances presupposes a carrier of some kind or description separate and distinct from the article or thing transported.

As was said in the case of *Gloucester Ferry Co.* v.

Pennsylvania, 114 U. S., 196 (1884), by Mr. Justice FIELD, at page 203:

> "Transportation implies the taking up of persons or property at some point and putting them down at another."

In the present case there is not any separation of the Sea Stores from the ship. They are not set down at any point. They are acquired and taken on board for the purpose of consumption on board. They are incorporated as it were into the body of the ship. Properly considered, Sea Stores are really aids to transportation, rather than the subject matter thereof. While, of course, all parts of the vessel, including masts, spars, tackle and apparel, as well as sea stores, necessarily move with her when she moves they are not being transported in the sense of that word as understood by our statutes or case law. It is submitted that the transportation prohibited by the Eighteenth Amendment and the National Prohibition Act is transportation in a commercial sense. Undoubtedly this was present in both the *Grogan* and *Anchor Lines* cases. In both of these cases there was a definite consignor and consignee and a movement from one to another over the territory of the United States. The liquor was ordinary merchandise and the very subject matter of the transportation. The vehicles of transportation were entirely separate and distinct from this subject matter and their use was invoked for the sole and express purpose of effecting the movement of the intoxicating liquor in question. Nor can it be fairly contended that the consumption of these liquors by the passengers and crew upon the high seas constitutes a delivery of the latter within the ordinary meaning of the term. There is no real analogy in the argument advanced by Judge HAND in his effort to bring the movement of these sea stores within the accepted definition of transportation as laid down in the *Gloucester Ferry* case *(supra)*. The substantial basis for distinguishing this movement,

however, from that involved in the *Grogan* and *Anchor Line* decisions is found in a consideration of the National Prohibition Act in its entirety. Specific reference to the question of transportation is found in Sections 13 and 14 of Title II of the Act, and here Congress considers the question in some detail by requiring the carriers to mark the consignors and consignees names on the outside of all packages in addition to making clear the contents thereof. While it is true, as said by Judge HAND, that a regulation of this kind of transportation does not necessarily impute to the word itself any of the conditions which it enacts, it is an even more reasonable supposition to assume that this specific and detailed reference to transportation manifested the congressional conception of the term as being used in the ordinary commercial sense, and it is submitted that the movement of these sea stores of liquors within our territorial waters can in no way be fairly construed to fall within that definition. Under the *Street* case *(supra)* the conveyance from warehouse to residence was held not to be transportation with the Act, because the goods were in the owner's possession in a leased room in a warehouse, and in effect merely transferred by him to his residence. In the *Corneli* case *(supra)* a different result was reached because the goods were in possession of the warehouse, and the transfer thereof involved commercial transportation of and delivery to the owner at the latter's residence. Sea stores, like bunker coal, belonged to the ship owner and are on board his vessel solely for consumption therein. They are not received from any shipper nor are they to be delivered to any consignee, and transportation is *not* the purpose of their presence on shipboard. They are brought within the territorial waters of the United States merely because it is unavoidable under the circumstances.

It is submitted, moreover, that the mere possession of intoxicating liquors is not prohibited by the Eighteenth Amendment. If the National Prohibition Act goes beyond the limits of that Amendment, and prohibits

mere possession, it is unsupported by the Constitution, and, to that extent at least, unenforceable. But while the language of Section 3, Title II, does prohibit any person to "possess any intoxicating liquor except as authorized in this act," read in connection with Section 33, Title II, such unauthorized possession would appear only to be *prima facie* evidence of possession for one of the illegal purposes prescribed in the act, and not in and of itself to be punishable. That this construction is correct is emphasized by the provisions of Section 20, Title III, where the congressional intention clearly expressed with respect to the Canal Zone is to make possession in and of itself a crime, as also to prohibit, not only the technical "importation" into the Zone, but the introduction of liquor into that specific territory. Not only, too, is possession prohibited, but it is made a crime to have "under one's control within the Canal Zone" any of the specified beverages. So, a man in the position of Corneli in 257 U. S., 491, who had liquor stored in a bonded warehouse, and adjudged by this Court not to have possession, but who undoubtedly had control in the sense of having title and—except for the Act—right to possession, if in the Canal Zone, would probably be held to violate the act.

If it be suggested that the Prohibition Act, Section 33, Title II, makes the possession of liquors by any person not legally permitted by the provisions of the statute to possess liquor, evidence that such liquor is kept for purposes prohibited by the statute, the answer is that it is only *prima facie* evidence of that fact. In the *Street* case, Justice CLARKE dealt with this situation as follows (p. 94):

> "Assuming that the unexplained presence of the liquors in the Company's warehouse would give rise to the prescribed presumption, yet, if that presumption should be rebutted by appropriate testimony (as it is in this case by admissions) that the liquor to which it is applied is not being kept

> for the purpose of sale, barter, exchange, furnishing or otherwise disposing of it in violation of the provisions of the title, the implication is plain that the possession should be considered not unlawful, even though it be by a 'person not legally permitted,'—that is by a person not holding a technical permit to possess it, such as is provided for in the act."

And the Court goes on to say (p. 94):

> "Without saying that there may not be other cases, the one at bar seems to be fairly within the scope of this obvious implication of Section 33.
>
> "It may be that the custody of liquors by the Warehouse Company was thus not declared to be unlawful because the writers of the act did not have such a case in mind, but it was more probable because Congress would not consent to allow lawful possession and use of liquors in dwellings having storage facilities for them, while denying the only possible means of preserving and protecting such liquors to persons with less commodious homes. Congress was concerned with the great problem of preventing the manufacture and sale of intoxicating liquors for beverage purposes in the future, and it seems to have given but slight attention to the consumption of such relatively small amounts of such liquors as might be in existence in private ownership and intended for consumption by the owner, his family or his guests, when the amendment of the act should take effect.
>
> *"An intention to confiscate private property, even in intoxicating liquors, will not be raised by inference and construction from provisions of law which have ample field for other operation in effecting a purpose clearly indicated and declared."* (Italics ours.)

It is our contention that the cases of liquor carried as part of ship stores in foreign merchant vessels, also fairly fall within the obvious implication of Section 33 of Title II, and that an intention to confiscate the private

property in these liquors and to extend the jurisdiction of an act which is in the most emphatic sense of the term, a domestic police regulation, over the internal concerns of foreign ships, and thus indirectly to foist our laws and our conception of the proper use of alcohol for beverage purposes, over the people of other nations whose usages and laws differ from ours, has not been expressed by the Eighteenth Amendment nor by Congress.

VI.

Summary of Argument.

Summing up, therefore, it is our contention that although the Amendment and the Act by their terms apply to the United States and all territory subject to its jurisdiction, those words in and by themselves do not operate to constitute regulations of the internal affairs of foreign merchant vessels coming within our waters; that immemorial usage has established the right of such vessels to bring within our jurisdiction as a part of the stores or supplies for the use of passengers and crew on their voyage, certain alcoholic beverages; that something more than the enactments now on the statute books would be required to prohibit continuance of that custom; that the mere possession of liquor on board a ship, lawful in its inception, does not become unlawful the moment the ship crosses the three-mile limit into our territorial waters; that the continuance of these liquors on board the ship while in our waters, on her progress from the three-mile limit to her dock and return, is not transportation within the meaning of that word as it is used in the Amendment and the Prohibition Act; and that for these reasons, the judgment of the District Court should be reversed, and the defendants enjoined from interfering with the continuance of the customs and practices in this regard pursued by vessels of foreign registry.

GEORGE W. WICKERSHAM,
Counsel for Appellants.

Opinion Referred to in Treasury Decision 38218 of Attorney General Palmer to the Secretary of the Treasury, Dated January 23, 1920.

"Department of Justice
January 23, 1920.

"Dear Mr. Secretary:

"I have the honor to acknowledge receipt of your letter of January 20th, enclosing a letter from the Secretary of State with a communication from the Italian Embassy regarding instructions given to Collectors of Customs in Treasury Decision No. 38218 of December 11, 1919, requiring that all liquors which are prohibited importation, but which are properly listed as sea stores on vessels arriving in ports of the United States, should be placed under seal by the Boarding Officer and kept sealed during the entire time of the vessel's stay in port, no part thereof to be removed from under seal for use by the crew at meals or for any other purpose. You ask my opinion upon the following questions:

1. Are the instructions mentioned and the practice of the Customs Officers in accordance therewith authorized under the law?

2. If permissible in part but not in their entirety, to what extent should they be modified to meet legal requirements and to restrain as far as possible the prevalent practice of smuggling liquor from vessels in ports of the United States?

3. Should there be any difference in practice as between American and foreign vessels in such matters?

"With respect to American vessels it is sufficient to say that the Prohibition Law applies as well on board such vessels while in American ports as at any other point within the United States. As to such vessels I do not think the validity of the regulation mentioned can be successfully questioned.

"The status of foreign vessels in American ports however, is somewhat different. I think the state o International Law on the subject of private vessels i foreign ports is, generally speaking, this:

"So far as regards acts done at sea before her arriva in port and acts done on board in port, by members o the crew to one another, and so far as regards the ge eral regulation of the rights and duties of those belongin on board, the vessel is exempt from local jurisdictio but, if the acts done on board affect the peace of th country in whose port she lies, or the persons or propert of its subjects, to that extent that state has jurisdictio (Moore's International Law Digest, Vol. II, page 297

"The Complaint made against the Treasury Decisio mentioned is that by requiring liquors properly liste as sea stores to be kept under seal during the time suc vessels are in American ports it prevents the distribu tion to the crews of the usual amount for daily consump tion, which in the case of Italian vessels it is said is r quired by the contracts with the crew.

"I agree entirely that excessive or surplus liquo stores are subject to seizure and forfeiture, but I am n prepared to say that the daily distribution to the crew of the usual quantity for consumption on board the shi so affects the peace of this country that American off cials are authorized to interfere. Of course, the bring ing of such liquors on shore, even by the members of th crew to whom they are issued, will be unlawful and sub ject the offender to prosecution, but so long as the liquor on board are properly listed as sea stores, and are not ex cessive in quantity I do not think their daily distributio on board the ship can properly be interfered with by th Government.

"I am therefore of opinion that the regulations shoul be modified to the extent above indicated.

Respectfully,

A. MITCHELL PALMER,
Attorney Genera

To the Secretary of the Treasury."

Opinion of General Counsel of Shipping Board.

"June 13th, 1922.

"Honorable A. D. Lasker,
Chairman, U. S. Shipping Board,
Washington, D. C.

"My dear Mr. Lasker:

"You have requested from me an opinion as to the right of American vessels, including those operated by the Shipping Board, to sell liquor outside of the three mile limit. In my opinion neither the Eighteenth Amendment nor the Volstead Law applies to American ships outside the three mile limit, and therefore, in my opinion liquor may be sold on all American ships, including Shipping Board ships, outside the three mile limit.

"The Eighteenth Amendment provides that

> 'the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.'

"The question narrows itself down to the legal interpretation of the words, as used in the amendment, 'all territory subject to the jurisdiction thereof.' Is an American ship, outside of the three mile limit, *'territory subject to the jurisdiction of the United States'*, in the sense that those words are used in the Eighteenth Amendment? It has long been an established rule of construction that, as Chief Justice WAITE says in *Tennessee* v. *Whitworth*, 117 U. S., 139:

> 'Words in a Constitution as well as words in a statute are always to be given the meaning they have in common use, unless there are very strong reasons to the contrary.'

"It has again been said in the article on constitutional construction in 10 Fed. Stat. Annot., pages 275, 276:

> 'Words in the Constitution * * * are to be taken in the sense in which they were used and understood by common law and at the time the Constitution and the amendments were adopted.'

"The word 'territory' at the time of the adoption of the Eighteenth Amendment had a clear and well defined legal meaning. The prior use of the word 'territory' in the Constitution appears in Section 3 of Article 4, which provides as follows:

> 'The Congress shall have power to dispose of and make all needful rules and regulations respecting the *territory* or other property, belonging to the United States.'

"This article of the Constitution came before the Supreme Court of the United States for construction in *U. S.* v. *Gratiot*, 14 Peters 526. Mr. Justice THOMPSON, in delivering the unanimous opinion of the Court there defined the meaning of the word 'territory' as follows:

> 'The Constitution of the United States (Article 4, Section 3) provides: "That Congress shall have power to dispose of and make all needful rules and regulations respecting the *territory* or other property belonging to the United States." The term *territory*, as here used, is merely descriptive of one kind of property and is equivalent to the word *lands!*'

"As used in statutes of the United States, the word 'territory' has been defined in at least four cases as a place, subject to the jurisdiction of the United States, which has an organized government with an executive, legislative and judicial system; and lands subject to the jurisdiction of the United States, which have no such organized government have been held not to be territories. *Kopel* v. *Bingham*, 211 U. S., 468; *Ex parte Morgan*, 20

Fed. Rep., 298; *in re Lane,* 135 U. S., 443; *Brunswick First National Bank* v. *Yankton County,* 101 U. S., 133.

"But finally, as if to make it plain beyond controversy that the amendment was dealing with territorial limits in a legal sense, Congress, in proposing the amendment, avoided the use of the wider language which had been embodied in the Thirteenth Amendment prohibiting slavery 'within the United States or *any place* subject to their jurisdiction,' and used the narrower, clearly defined terms 'territory subject to the jurisdiction of the United States.' It had previously been decided that there were 'places' even on land that were subject to the jurisdiction of the United States which were not 'territory.' *In re Lane,* 135 U. S., 43; *Ex parte Morgan,* 20 Fed. Rep., 298; *Kopel* v. *Bingham,* 211 U. S., 468.

"And in the National Prohibition cases recently decided, 253 U. S., 350; the Supreme Court held that prohibition 'is operative throughout the *entire territorial limits* of the United States.' The words 'territorial limits' are words of limitation; they indicate the boundaries within which the prohibition lies. 'Territorial limits' plainly means the limits of lands; 'territorial limits' do not extend into or over the high seas.

"A careful construction of the amendment itself conclusively bears out this construction. The amendment reads:

> 'the manufacture, sale, or transportation of intoxicating liquors within, *the importation thereof into, or the exportation thereof from* the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.'

"It would be a grotesque use of terms to speak of importing or exporting beverages into a ship on the high seas or from a ship on the high seas.

"Finally, it seems to me the case of *Scharrenberg* v. *Dollar Steamship Company,* 245 U. S., 122, is conclusive

of the question. In that case an Act of Congress made it a misdemeanor for any corporation in any way to assist or encourage the importation or migration of any contract laborer or contract laborers *into the United States*, and a contract laborer was by the statute defined as 'one who comes to perform labor *in this country*.' The Supreme Court held, to quote from the syllabus:

> *'An American ship engaged in foreign commerce is not a part of the territory of the United States in the sense that seamen employed upon her while in American ports or on voyages can be said to be performing labor in this country within the meaning of the statutory provisions above cited.'*

and that

> 'Inducing and assisting aliens to come from abroad, working as seamen on the way, for bona fide service as seamen on an American ship during her voyage from American ports to foreign countries and while she lies in such ports preparatory to or in the course of such voyage, is not an assisting or encouraging of the importation or migration of alien "contract laborers" *into the United States.*'

"And the Supreme Court said on page 127:

> *'Equally unallowable is the contention that a ship of American registry engaged in foreign commerce is a part of the territory of the United States in such a sense that men employed on it can be said to be laboring "in the United States" or "performing labor in this country." It is, of course, true that for the purposes of jurisdiction a ship, even on the high seas, is often said to be a part of the territory of the nation whose flag it flies. But in the physical sense this expression is obviously figurative* (International Law Digest, Moore, Vol. I, par. 174), *and to expand the doctrine to the extent of treating seamen employed on such a ship as working in the country of its registry is quite impossible.'*

"Acting Attorney General Frierson, in rendering his opinion on November 1, 1920, wholly fails to take this distinction into account, and by reason thereof arrives at an erroneous conclusion, and the two cases cited by him, in view of the special circumstances in those two cases, in no way bears out his contention.

"Furthermore, it is a century old principle of International Law that ships are not territory in an actual sense, because for example:

(a) They are subject to the jurisdiction of local authorities in foreign waters for the punishment of crimes committed on board in such waters.

(b) Neutral merchant ships may be seized on high seas and condemned by belligerents for carrying contraband of war.

(c) They may be seized, attached and sold under process in rem for claims in tort, or for debt, in our own or in a foreign country.

(d) Political refugees may be removed from them when they are in foreign waters; there is no right of asylum on merchant ships for such persons; II Moore's International Law Digest, 855, 858. *Wildenhus's Case*, 120 U. S., 1.

If they were actually territorial

(a) No person could be seized or punished by a foreign nation for a crime committed within the actual territorial limits of the United States.

(b) No part of the actual territory of the United States can be seized or proceeded against by a foreign power for unlawful acts committed within such territory, complaint in respect of all such matters must be made to the sovereign.

(c) Actual territory can neither be seized, attached nor sold under process in rem or other process, for claims in tort or for debt; claims against any part of the national territory must be presented to the sovereign.

(d) There would be a right of asylum on board of them for political refugees; such refugees are protected within the actual territory of the United States.

"As a matter of fact, according to Italian law, it is necessary for a steamship company to furnish each member of its crew with a stipulated daily allowance of wine. Treasury decision No. 38,218 was promulgated on December 11, 1919, and required that all liquors, which are prohibited importation, but which are properly listed as sea stores on vessels arriving in the ports of the United States, should be placed under seal by the boarding officer and kept sealed during the entire time of the vessel's stay in port, and that, no part thereof can be removed from under seal for use by the crew at meals or for any other purpose. The Italian Embassy appealed to our State Department for relief from this treasury regulation, and in an opinion rendered January 23, 1920, Attorney General Palmer himself rendered an opinion to the Secretary of State that

> 'So long as the liquors on board are properly listed as sea stores and are not excessive in quantity, I do not think their daily distribution on board the (Italian) ship can properly be interfered with by this government. I am, therefore, of the opinion that the regulation should be modified in the case above indicated.'

And in the same opinion the Attorney General states:

> 'With respect to American vessels it is sufficient to say that the prohibition law applies as well on board such vessels while in American ports

as at any other points within the United States. As to such vessels I do not think that the validity of the regulations mentioned can be successfully questioned.'

"By implication this opinion of the Attorney General limits the enforcement of the Prohibition Act to American ships while in port, and the Treasury regulation itself has the same effect and in no way covers or attempts to cover the sale of liquors on American vessels while they are outside of the three mile limit.

"The Volstead Act itself contains no reference to the territorial limitations within which it shall be operative, and it follows axiomatically, of course, that it cannot extend beyond the limits defined by the Eighteenth Amendment, and that if the amendment itself does not apply to American ships beyond the three mile limit, the Volstead Act itself cannot do so.

"For these and other reasons which I will not here detail at length, I am of the foregoing opinion.

"I hereby confirm the oral opinion which I rendered to you and the United States Shipping Board in July, 1921, after a careful review of the authorities. A further review just made, because of certain letters you have just received, does not indicate any reasons to cause me to change my opinion that the law is not being violated.

Very truly yours,

(Signed) ELMER SCHLESINGER,
General Counsel."

Opinion of Attorney General Daugherty, Dated October 6, 1922.

"Oct. 6, 1922.

"My Dear Mr. Secretary:

"Acknowledgment is made of the receipt of your letter of June 23, 1922, in which you enclosed an opinion of the general counsel of the Shipping Board, holding that the Eighteenth Amendment does not apply to American ships on the high seas and stating that in conformity with said opinion liquor is being furnished for beverage purposes on Shipping Board vessels outside the territorial waters of the United States.

"You suggest a reconsideration of the rulings of this department, particularly the opinion of Nov. 1, 1920, relating to the application of the National Prohibition act to American ships on the high seas and request advice from this department whether the practice of selling liquors on American ships outside the territorial waters of the United States is permissible under the law.

"You further request this department to advise you whether under our interpretation of the law and the decisions in *Grogan* v. *Walker* and *Anchor Line* v. *Aldridge*, cases decided by the United States Supreme Court, May 15, 1922, the sale, transportation or possession of intoxicating liquor for beverage purposes on foreign vessels while in American waters is prohibited.

"My answer to the first question is in the negative for the following reasons:

"The Eighteenth Amendment to the Constitution of the United States provides:

> 'The manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.'

"The fundamental consideration then, upon which the answer to your first query rests, is whether United States ships while on the high seas fall under the legal interpretation of the phrase,

> 'the United States and all territory subject to the jurisdiction thereof.'

"To arrive at the correct legal interpretation of any constitutional provision, it is necessary to:

> 'Read it in the light * * * of the context * * * and the subject with which the amendment dealt and the purpose which it was intended to accomplish * * * .' (Chief Justice WHITE, concurring in the National Prohibition cases, 350 U. S. 350-390).

"The purpose or intent of the States in adopting the Eighteenth Amendment and that of the legislative body in initiating it, must be considered in the light of 'the mischief to be prevented' *(Craig* v. *Missouri,* 4 Pet. 410, 431), the subject, the context and the intention of the body inserting the word in the Constitution *(McCulloch* v. *Maryland,* 4 Wheat. 316), 'all the aids and lights of contemporary history' *(Kendall* v. *United States ex rel Stokes,* 12 Pet. 524), 'in connection with the known condition of affairs out of which the occasion for its adopting may have arisen * * * in a way, so far as is reasonably possible to forward the known purpose or object for which the amendment was adopted' *(Maxwell* v. *Dow,* 176 U. S. 581).

"The mischief to be prevented in prohibition enactments has been construed as the use of intoxicating liquor as a beverage (see *Crane* v. *Campbell,* 245 U. S. 304). A glance at contemporary history and the conditions of affairs out of which the adoption of the Eighteenth Amendment arose compels the admission that it represents the culmination of fifty years' struggle of

the American people to effectively settle the problems arising from the use of intoxicating liquor as a beverage. Beginning by county, and State by State, the area wherein the manufacture, sale and possession of intoxicants were made illegal grew until by the ratification by forty-five of the forty-eight States of the Union an amendment affirming and extending such prohibition was added to our Federal Constitution. To hold that the intent of Congress in proposing the wording of the amendment, and of the States in ratifying it, was anything less than to extend its inhibitions where the judicial arm of this Government extended for any purposes, is to fail to apply all the rules the Supreme Court has laid down for arriving at the intent of constitutional enactments.

"The terms 'all territory subject to the jurisdiction thereof,' expresses not a limitation just to lands, as the word territory might alone be construed, but rather an extension wherever the jurisdiction of the United States may reach.

"Certainly Shipping Board vessels operated and owned by our very Government itself are 'subject to the jurisdiction thereof.' Because of their ownership by the Government they would, in a double sense, be subject to the restrictions of the Eighteenth Amendment. But every American vessel is for some purpose regarded as a part of American territory and our laws are the rules for its guidance. *(The Scotia,* 14 Wall. 170, 184).

> 'It is often stated that a ship on the high seas constitutes a part of the territory of the nation whose flag it flies. In the physical sense this phrase obviously is metaphorical. In the legal sense it means that a ship on the high seas is subject to the exclusive jurisdiction of the nation to which, or to whose citizens, it belongs. The jurisdiction is *quasi* territorial.' (Moore's International Law Digest, vol. 1, p. 930; *U. S.* v. *Rodgers,* 150 U. S. 249).

"Our diplomatic correspondence and the opinions of the courts have uniformly considered that insofar as the restraining and protecting jurisdiction of our Government is concerned, American ships, whether owned by the Government or by private citizens or corporations, are in many respects territory of the United States. Some interesting observations in this connection are:

"In the case of *United States* v. *Rodgers,* 150 U. S., 249, it is said:

> 'A vessel is deemed part of the territory of the country to which she belongs.'

"In the case of *Crapo* v. *Kelly,* 16 Wall. 610, the Supreme Court said:

> 'The question then arises, while thus upon the high seas was she in law within the territory of Massachusetts? * * * This (the Constitution) gives the power to the courts of the United States to try those cases in which are involved questions arising out of maritime affairs and of crimes committed on the high seas.'

"In *Lindstrom* v. *International Navigation Company,* 177 Fed. 170, the Court said:

> 'The St. Paul is an American vessel, registered at the Port of New York, and when she was on the high seas was a part of the territory of the State of New York, hence all civil rights of action for matters occurring aboard of her at sea are determined by the laws of that State.' (*McDonald* v. *Mallory,* 77 N. Y. 546, 33 American Reports, 664; *The Lamington* (D. C.), 87 Fed. 752; *St. Clair* v. *United States,* 154 U. S. 152, 38, L. ed. 936.)

"Mr. Blaine, Secretary of State, in a letter to Mr. Ryan, Minister to Mexico, Nov. 27, 1889 (set forth in Moore's Law Digest, vol. 1, p. 931), says:

> 'Merchant vessels on the high seas, being constructively considered as for most purposes a part

> of the territory of the nation to which they belong, they are not subject to the criminal laws and processes of another nation.'

"Mr. Webster, as Secretary of State, spoke for this Government in his letter to Lord Ashburton, August, 1842, as follows:

> 'It is natural to consider the vessels of a nation as a part of its territory, though at sea, as the State retains its jurisdiction over them and, according to the commonly received custom, this jurisdiction is preserved over the vessels even in parts of the sea subject to a foreign dominion. * * * It is true that the jurisdiction of a nation over a vessel belonging to it, while lying in the port of another, is not necessarily wholly exclusive. We do not so consider or so assert it. For any unlawful acts done by her while thus lying in port, and for all contracts entered into while there, by her master or owners, she and they must, doubtless be answerable to the laws of the place * * * but, nevertheless, the law of nations, as I have stated it, and the statutes of governments founded on that law, as I have referred to them, show that enlightened nations, in modern times, do clearly hold that the jurisdiction and laws of a nation accompany her ships not only over the high seas, but into ports and harbors, or wheresoever else they may be, for the general purpose of governing and regulating the rights, duties and obligations of those on board thereof, and that, to the extent of the exercise of this jurisdiction, they are considered as parts of the territory of the nation herself.' (Webster's Works, Vol. 6, pp. 306, 307).

"This case was cited with approval by the United States Supreme Court in the case of *United States* v. *Rodgers (supra)*.

"In the case of *St. Clair* v. *United States*, 154 U. S., 134, 152, the Court held:

> 'A vessel registered as a vessel of the United States, is, in many respects, considered as a portion of its territory, and "persons on board are protected and governed by the laws of the country to which the vessel belongs."'

"Ships are 'territory' in a constructive rather than an actual sense. The distinction is clearly shown by Justice FIELD in *United States* v. *Smiley*, 6 Sawyer, 640, 645:

> 'The criminal jurisdiction of the government of the United States is * * * limited to their own territory, actual or constructive. * * * The constructive territory * * * embraces vessels sailing under their flag; wherever they go they carry the laws of their country, and for a violation of them their officers and men may be subjected to punishment.'

"Great stress is laid on the argument that the word 'territory' in the Eighteenth Amendment must be construed the same as it was in its use in Article IV, Section 3, of the Constitution, and the case of *United States* v. *Gratiot*, 14 Pet., 526, is cited to show a construction synonymous with the word 'lands.' But that the same construction must be given the same word when used in an entirely different context does not follow (*Cherokee Nation* v. *Georgia*, 5 Pet., 1). Furthermore, the definition of the word 'territory' in the *Gratiot* cases *(supra)* is specifically restricted in its application to the use in Article IV, since the Supreme Court says they interpret the word 'territory' only 'as here used.' It there referred undoubtedly only to lands, because Article IV, Section 3, was placed in the Constitution to give the Federal Government authority over the Western territory claimed by States under their conflicting sea to sea grants. (See debates in the Constitutional Convention and Watson on the Constitution, Vol. 21, p. 1255.)

"The construction of the word 'territory' in the fourth article of the Constitution to mean lands is in complete harmony with the intent of the framers of that article of the Constitution. I believe from the study of the history of conditions out of which the Eighteenth Amendment grew, it is equally clear that the words 'territory subject to the jurisdiction' of the United States carry the intent to extend its provisions over every spot where the flag of America flies.

"This intent is a living part of the Eighteenth Amendment and the National Prohibition act, for as Justice BROWN has said in *Hawaii* v. *Mankichi*, 190 U. S., 197, 212:

> 'Without going back to the famous case of the drawing of blood in the streets of Bologna, the books are full of authorities to the effect that the intention of the law-making power will prevail, even against the letter of the statute; or, as tersely expressed by Mr. Justice SWAYNE in *Smythe* v. *Fiske*, 23 Wall. 374, 380: "A thing may be within the letter of a statute and not within its meaning, *and within its meaning, though not within its letter.* THE INTENTION OF THE LAW MAKER IS THE LAW." A parallel expression is found in the opinion of Mr. Chief Justice THOMPSON of the Supreme Court of the State of New York (subsequently Mr. Justice THOMPSON of this Court) in *People* v. *Utica Insurance Company*, 15 Johns, 358, 381: "A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers."'

"It is urged that acts passed under Article I, Section 8, Clause 10 of the Constitution, all carry the express provision that they shall apply on the high seas, whereas

the National Prohibition act does not contain such plain extension. But the difference between the two provisions of the Constitution by authority of which the laws emanate is material. Article 1, Section 8, Clause 10, gives Congress power to define and punish piracies and felonies committed on the high seas, which offenses by their nature had formerly remained solely in the power of the States to handle. Article 1 of the Constitution prohibited nothing, nor did it define an offense. Of course, therefore, it was necessary for the act of Congress to define the offense, provide for its punishment and make provision as to its jurisdiction, since all the regulatory power lay in the Congressional enactment, not in the Constitutional provision. The Eighteenth Amendment is quite different.

"It is really a law itself, as well as a declaration of an organic Constitutional principle. From its terms alone flows the real prohibition. Palpably, therefore, since by the force of the amendment prohibition is carried everywhere within the confines of the sovereignty of the United States, the National Prohibition act passed to facilitate its enforcement and punish its violation would be co-extensive therewith.

"The Thirteenth Amendment is simliar. It, too, names a new prohibition and states the extent of its application. Enactments resulting from it do not carry specific provision for their application to offenses committed on the high seas, and yet no one would advance the theory that because of that fact slavery might be permitted on American ships while on the high seas. (See Section 268, Penal Code, also the Peonage Sections 269, 270, 271, P. C.)

"Concerning the self-execution effect of the provisions of the Thirteenth Amendment, the observation of Mr. Justice BRADLEY in the *Civil Rights* cases, 109 U. S., 3,

20, is interesting in the light of its applicability also to the effect of the Eighteenth Amendment:

> 'This Amendment, as well as the 14th, is undoubtedly self-executing without any ancillary legislation so far as its terms are applicable to any existing state of circumstances. By its own unaided force and effect, it abolished slavery and established universal freedom. Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit.'

"Another illustration of the application of a provision of the Constitution and laws passed pursuant to it to the high seas, even though there is no specific reference to the high seas, is found in Article 3, Section 3, Clause 1 of the Constitution, defining treason. It does not indicate the territorial scope of its application, nor do the acts of Congress passed to enforce it, but in the *United States* v. *Greathouse*, 4 Savoy, 457, it was held that the purchase and fitting up of a vessel with arms in furtherance of a design to commit hostilities on the high seas constituted treason. (See also *Hawaii* v. *Mankichi*, 190 U. S., 197.)

"Section 37 of the Penal Code and other general statutes of the United States having by their terms no specific extension to the high seas have been held to extend to violations committed on American vessels outside of American waters.

"The same rule has been applied in cases of extradition; for instance, where the treaty has provided that persons will be surrendered who commit crimes within the jurisdiction of the demanding country, the word 'jurisdiction' has been held to cover vessels on the high seas. (Moore on Extradition, Vol. 1, p. 135, Sec. 104, Vogt. 14, Op., A. G., 281; Wharton's State Trials, pp. 392, 403, 404; Beale's Cases on Conflict of Laws, Sec. 22, p. 506.)

"Vessels are taxable as personal property at their home port, although they are actually on the high seas, and have never in fact come within the jurisdiction of the home port (*People ex rel The Pacific Mail S. S. Co.* v. *Commissioner of Taxes, etc.*, 58 N. Y., 242; *Olson* v. *San Francisco*, 82 Pac., 850). Similarly, the pilotage laws (*Wilson* v. *McNamee*, 102 U. S., 572, 574) and the laws concerning assignment (*Crapo* v. *Kelly*, 16 Wall, 610) have such extended operation. It is a recognized principle of law that the State has general civil jurisdiction over vessels registered at her ports, even where the cause of action arises on the high seas (*Wilson* v. *McNamee*, 102 U. S., 572; *Manchester* v. *Commissioner of Mass.*, 139 U. S., 240; *Crapo* v. *Kelly (supra); Old Dominion Steamship* v. *Gilmore*, 207 U. S., 398, 403). In the *Old Dominion Steamship Company* case, Mr. Justice HOLMES in delivering the opinion of the Court, said:

> 'In short, the bare fact of the parties being outside the territory in a place belonging to no other sovereign, would not limit the authority of the State, as accepted by civilized theory. No one doubts the power of England or France to govern their own ships on the high seas.'

"The open oceans, outside the territorial waters of nations, have long been regarded as the highway of all, wherein all the nations share the privileges of tenants in common. If, then, the United States shares the high seas as a tenant in common with other nations of the world, the Eighteenth Amendment would be broad enough to comprehend the sea as territory of the United States in so far as and where, and when, it is used by American bottoms.

"In an early English case, the *King against Brizac and Scott*, 4 East Term Reports, 164, it is held that 'an information for conspiracy * * * for planning and fabricating false vouchers to cheat the Crown, which

planning and fabricating were done on the high seas, is well triable in Middlesex.' (Quoting from the head note.)

"In Corpus Juris, Vol. XVI, under the heading Criminal Law, p. 169, par. 216, it is said:

> 'In the absence of a statute the courts of a country have no jurisdiction of an offense committed on the high seas except in the case of piracy, *unless the offense is committed on board a ship belonging to that country.*' (Italics ours.)

"An examination of the National Prohibition act, by itself, leads to the conclusion that its operation is extended to American vessels on the high seas, since its terms are absolutely general and have no limits of any sort. The only objection is that crimes on the high seas are all dealt with in Chapters 11 and 12 of the Criminal Code, but the peculiar language of the relevant section, 272, Penal Code, is significant. All it says is that the crimes and offenses named in the chapter shall be punished when committed on the high seas. It then lists certain ordinary common law offenses such as murder, over which, of course, the Federal Government would not ordinarily by virtue of its limited powers have any jurisdiction whatsoever. There is no intimation in Section 272 that no other crimes and offenses except those defined in Chapter 11 shall be punished when committed on American vessels on the high seas, and especially is there no suggestion that offenses which violate the avowed constitutional policy of the Federal Government itself shall be so exempted from punishment. On the contrary, the grant in Section 2 of the Eighteenth Amendment of concurrent power to the States and to the Federal Government to enforce the provisions of Section 1 thereof would justify the reasonable conclusion that the Federal enactment passed pursuant thereto reached to the jurisdictional limits of other Federal laws. The provisions of the criminal code generally apply to the same

territory over which the judicial code gives jurisdiction to the United States courts, and Section 41 of the judicial code, provides:

> 'The trial of all offenses committed upon the high seas, * * * shall be in the district where the offender is found, or into which he is first brought.' (See *Pedersen et al.* v. *United States*, 271 Fed., 187.)

"The Shipping Board has frequently sought to punish offenses committed against its property on the high seas by maintaining the applicability of general criminal statutes such as Section 37 and Section 35 of the Penal Code of the United States to crimes committed on the high seas (see *United States* v. *Hawkins*, So. Dist. of New York, also *United States* v. *Bowman et al.*, now pending in the Supreme Court of the United States, Docket 69). It would be inconsistent for American vessels to enjoy the protection of the laws of general jurisdiction and fail to be governed by the prohibitions of one of similar jurisdiction.

"In the case of *United States* v. *254 Bottles of Intoxicating Liquors*, Southern District of Texas, May 4, 1922, the Court announces that the 'sole question for decision is, had the master the right to possession of the goods on board ship (of United States) on the high seas and was this possession in violation of the National Prohibition act?' And then holds that such possession was a violation of the law, for which the stores were forfeitable and the owner liable to punishment.

"The case of *Scharrenberg* v. *Dollar Steamship Company*, 245 U. S., 122, is greatly relied upon by shipping interests as authority that an American ship is not in any sense a part of the territory of the United States. It was a case based on an alleged violation of an act of Congress by which it was a misdemeanor to assist contract laborers into the United States.

"A contract laborer was defined as one who comes to perform labor in this country. Clearly, the phrases 'into the United States' and 'into this country' are narrower in extent than 'the United States and all territory subject to the jurisdiction thereof.' Had the Eighteenth Amendment stopped after prohibiting the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States, the cases would be similar, but the Eighteenth Amendment goes further and says, 'and all territory subject to the jurisdiction thereof.' We are led inevitably, therefore, to the conclusion that after the prohibition in the United States (which to that point is analogous to the statute considered in the *Dollar Steamship Company* case), the phrase 'and all territory subject to the jurisdiction thereof' was added to extend the scope of the amendment to the very limits of national jurisdiction and sovereignty.

"My answer to your second question is in the affirmative.

"It is a long-established principle of municipal and international law that a nation has the right to make and enforce laws covering its territorial waters as well as its land. In *United States* v. *Diekelman,* 92 U. S., 520, 525, Mr. Chief Justice WAITE states:

> 'The merchant vessels of one country visiting the ports of another for the purposes of trade, subject themselves to the laws which govern the port they visit, so long as they remain; * * *' (See also Moore's International Law Digest, Vol. II, 275 *et seq.)*

"In 1885 Mr. Bayard, Secretary of State, wrote to the French Minister as follows:

> 'A foreign merchant vessel going into the port of a foreign State subjects herself to the laws of that State and is bound to conform to its commer-

cial as well as to its police and other regulations during the period of her stay there. "She is as much a *subditua temporaneous*," remarks Sir R. Phillimore, with reference to such a case, in the *Queen* v. *Keyn*, 2 Ex. D., 82, "as the individual who visits the interior of the country for the purposes of pleasure or business." (Moore's International Law Digest, Vol. II, p. 308.)

'It is part of the law of civilized nations that when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes, unless by treaty or otherwise the two countries have come to some different understanding or agreement; for, as was said by Chief Justice MARSHALL in *The Exchange*, 7 Cranch, 116, 144, "it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction and the Government to degradation, if such * * * merchants did not owe temporary and local allegiance and were not amendable to the jurisdiction of the country." *United States* v. *Diekelman*, 92 U. S., 520; 1 Phillimore's Int. Law, 3 D., ed. 483, Section 351; Twiss Law of Nations in Time of Peace, 229, Section 159; Creasy's Int. Law, 167, Section 176; Halleck's Int. Law, 1st ed., 171. And the English judges have uniformly recognized the rights of the courts of the country of which the port is part to punish crimes committed by one foreigner or another in a foreign merchant ship. *Regina* v. *Cunningham*, Bell C. C. 72; S. C. 8, Cox, C. C. 104; *Regina* v. *Anderson*, 11 Cox, C. C. 198, 204; S. C. L. R., 1 C. C., 161, 165; *Regina* v. *Keyn*, 13 Cox, C. C. 403, 486, 525, S. C. 2 Ex. Div., 63, 161, 213. As the owner has voluntarily taken his vessel for his own private purposes to a place within the dominion of a Government other than his own, and from which he seeks protection during his stay, he owes that Government such allegiance for the time being as is due for the protection to which he becomes entitled.' *(Wildenhus's Case*, 120 U. S., 1, 12.)

"If, then, the bringing in of liquors by foreign vessels as ship stores or otherwise constitutes a transportation or possession contrary to the Eighteenth Amendment and the National Prohibition act, it is clearly a violation of the law that no executive or administrative officer of the Government has the power to permit.

"The Constitution prohibits transportation which has been defined as 'the taking up of persons or property at some point and putting them down at another' *(Gloucester Ferry Company* v. *Commissioner of Pa.*, 114 U. S., 196, 203) that the innocence of any intent to 'put them down' or use them in the United States is not material in determining whether the transportation is a violation of the law is determined by the *Walker* and *Anchor Line* cases *(supra)*, where the Court decided that intoxicating liquors stored on one British ship could not lawfully be removed to another British ship in the New York harbor, although it was admittedly destined for beverage uses outside the United States.

"Furthermore, the National Prohibition act prohibits possession as well as transportation of intoxicants for beverage purposes, irrespective of where they are to be put to such beverage use. Under the reasoning of the Court in the *Walker* and *Anchor Line* cases *(supra)*, it is no argument for the legality of foreign ships possessing and transporting intoxicating liquors in and across our waters, that they do not intend to use the liquors until after leaving the jurisdiction of the United States, for the Court said in that connection:

> 'The Eighteenth Amendment meant a great revolution in the policy of this country, and presumably and obviously meant to upset a good many things on as well as off the statute book. It did not confine itself in any meticulous way to the use of intoxicants in this country * * *.
>
> 'It is obvious that those whose wishes and opinions were embodied in the Amendment meant to

> stop the whole business. They did not want intoxicating liquor in the United States and reasonably may have thought that if they let it in some of it was likely to stay. When, therefore, the Amendment forbids not only importation into and exportation from the United States but transportation within it, the natural meaning of the words expresses an altogether probable intent. The Prohibition Act only fortifies in this respect the interpretation of the Amendment itself. The manufacture, possession, sale and transportation of spirits and wine for other than beverage purposes are provided for in the act, but there is no provision for transshipment or carriage across the country from without. When Congress was ready to permit such a transit for special reasons, in the Canal Zone, it permitted it in express words. (Title III, Secs. 20, 41, Stat. 322).'

"Are we, then, to argue that such inflexible provisions of law, declared by our Supreme Court as the constitutional policy of our country, shall apply to our own citizens but be abandoned when we deal with ships of a foreign nation? To do so would be a grievous surrender of our sovereignty. And it is outside the province of an executive or administrative officer of the Government to read into the law and the Constitution an exception not specifically contained therein. Particularly should it be provided when the results of granting the privilege to foreign ships would be to produce manifestly unfair conditions of competition for our own citizens and shipping interests. Chief Justice MARSHALL puts the situation clearly in *'The Exchange,'* 7 Cranch, 116, 136, 144:

> 'The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. * * *
>
> 'When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indis-

> criminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the Government to degradation, if such individuals or merchants did not owe temporary and local allegiance and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries, are not employed by him, nor are they engaged in national pursuits. Consequently there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter can never be construed to grant such exemption.'

"Again, in *The Eagle*, 8 Wallace, 15, 22, the Supreme Court hold that:

> 'All vessels entering into or departing from a domestic or foreign port, are bound to obey the laws and well-known usages of the port, and are subject to seizure and penalties for disobedience; and when submitting to them, they are entitled to all the protection which they afford.'

"The Court carefully considered this whole question in the *Walker* and *Anchor Line* cases, and went so far as to hold that the Eighteenth Amendment and the National Prohibition act repealed a prior existing treaty with Great Britain.

"Prior to the sweeping and comprehensive construction placed upon the prohibition law in those cases it might possibly have been arguable whether liquors forming a part of the ship stores on vessels within territorial waters might be regarded as an implied exception to the National Prohibition act. Whatever doubts that may have previously existed have been swept away by the

language of the majority opinion in those cases. It is true that this decision was rendered by a divided court, but the dissenting opinion clearly sets forth the arguments that must have been carefully weighed before majority opinion was rendered. It included a consideration of such arguments as:

"'This country does not undertake to regulate the habits of people elsewhere' and 'it has no interest in meddling with them across its territory if leakage in transit is prevented.' But the very vigor of the dissenting opinion in which three judges joined simply emphasize the sweeping character of the majority by which I feel I am bound in deciding this question.

"I am therefore of the opinion that the Eighteenth Amendment and the National Prohibition act prohibit as unlawful the possession and transportatoin of beverage liquors on board foreign vessels while in our territorial waters whether such liquors are sealed or open.

"By way of summary, therefore, I am of the opinion that under the rules of fair intendment American ships wherever they may be are included in the terms of the Eighteenth Amendment 'territory subject to the jurisdiction' of the United States, so that manufacture, transportation or sale of intoxicating liquors for beverage purposes is prohibited thereon. To construe otherwise would, in my opinion, violate the unmistakable intent in the adoption, such intent clearly adduced from the study of the circumstances out of which it grew and voiced by the Supreme Court in the *Walker* and *Anchor Line* cases.

"This interpretation is further supported by the many authorities that have held ships to be 'constructive territory' of the country whose flag they fly. Such decisions undoubtedly extend the protection as well as the inhibitions of the country's laws.

"The National Prohibition act is an act of general jurisdiction in force wherever the Eighteenth Amendment

applies; and the courts of the United States have jurisdiction to punish its violations on the high seas.

"I am forced to the opinion under the ruling of the *Walker* and *Anchor Line* decisions *(supra)*, that foreign ships carrying intoxicating beverage liquors as ship stores or otherwise, within the three-mile limit of our shores, are violating the provisions of the National Prohibition act prohibiting possession or transportation of intoxicating liquors for beverage purposes. The Supreme Court therein has held that it is not material that the liquors may not be intended for beverage uses within the United States, because the court emphasized that the Eighteenth Amendment marks a revolution in our former national policy toward intoxicating liquor and does not confine its prohibition in any meticulous way within the United States, but on the contrary its intent was as far as possible to 'stop the whole business.'

Respectfully,

H. M. DAUGHERTY,
Attorney General.

Hon. ANDREW W. MELLON, Secretary of the Treasury."

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